CASE AND COMMENT

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The Jury Commissioner System

BY JOHN M. STEELE,

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THE JURY commissioner law applicable to Monroe County, New York, went into effect April 23, 1897. For nearly fourteen years its practical workings have been observed by the courts and by the general public. Perhaps no higher compliment can be paid it than to point to the fact that other counties adopting the jury commissioner system have patterned after its provisions, and have seen fit to adopt largely the administrative methods by which it has been carried into effect.

Necessity for the System.

The definite object aimed at by the jury commission system is to secure at a minimum cost competent and impartial jurors.

Under the old system, the supervisor, town clerk, and assessors of each town, and the supervisors in the city presented to the courts a list of persons from their town or ward, whom they certified as being qualified for the duties expected of them. Personal preference and political considerations oftimes entered largely into the selection of such lists. But little discrimination was made, though men were oftentimes physically, mentally, and morally unfit to sit as jurors. Of course much of this became manifest as soon as they were examined. But the summoning and excusing of so many incompetents alone cost the county thousands of dollars annually. Besides this same class of jurors came up year after year, and there was no means apparently of preventing it. It became evident that the matter ought to be placed in the hands of a commissioner of jurors, that he might select by careful inquiry, men known for character, for intelligence, for merit and fitness, so that a panel for the trial of any case could always be had representing the general intelligence of the community, and even better.

The waste of money in summoning persons not qualified or not fit for jury service, and of the time of the courts in the examination and the weeding out of such material, has been demonstrated to more than pay the cost of the commission system. But cost is a small matter compared with the mistrials, hindrances, delays, and denials of justice which were the perennial fruits of the old methods.

I have in mind a man who was drawn year after year under the old system, and as regularly rejected. He suffered continually from chronic kidney trouble, yet every time he went upon the stand the county was compelled to pay him $2 and his traveling expenses. In the end he cost the county $50. Now under the present system the halt, the maimed, and the blind are all gradually rounded up and gathered in the cabinet file of rejected names from which they will never again rise up to trouble the county or to cause it needless expense.

After our present law went into operation the sums annually paid to jurors showed a constant decrease, until at the

end of six years it was found that the department was annually saving the county about $14,000.

Inculcating Public Spirit.

I can remember when it was said that many a large property holder in the county had never done jury duty all his life. That time has gone by. Every eligible man is now called upon at some time to serve, and called in such a way that it will not be greatly to his inconvenience. Each juror is expected to serve his term of two weeks in rotation, this coming only once in three or four years. Instead of making jury duty a thing to be shunned, it is coming to be looked at from the more exalted standpoint of the benefit which every man who serves is bestowing upon the community. Often excellent men, exempt from jury service, when approached from the viewpoint of public duty have readily consented to waive their exemptions. Our jury lists contain the names of many of our wealthiest citizens, leading business men, public officials, and the pastors of several of our largest churches.

Grand Jurors and Trial Jurors.

I have a theory of my own with respect to the selection of men to act as grand jurors and those selected to act as trial jurors. A grand jury does not sit to try the evidence in a case. It has no power to take away a man's property, his liberty, or his life. The utmost that it can do is to hear the worst side of a case against a man, hold him for trial if it thinks the evidence warrants it, and then turn the case over to the trial jury to pass upon the question of the guilt or innocence of the accused. For that reason and quite contrary to public sentiment on the matter, I do not believe that to be a grand juror requires nearly such high qualification as to be a trial juror. If a supervisor came to me with a list of seventy names from his town or ward, I would prefer to have him give me the twenty-four most unpromising ones for grand-jury service and the remainder for the trial jury. When it comes to a body which must weigh evidence and ultimately decide what disposition shall be made of my property, liberty, and life, I want men upon that jury concerning whose qualifications to perform the grave responsibility resting upon them there is no shadow of doubt.

Examination of Jurors.

The examination to which every candidate for jury duty is subjected is not a technical one. It presents a list of simple questions such as every intelligent, English-speaking citizen ought to be able to answer. One's place of residence, his citizenship, his age, his birthplace, his condition as a property owner, and his occupation, introduce the list, after which come a few simple questions regarding elementary legal matters which it is absolutely essential a juror should know in order to intelligently and faithfully perform his duties. The definitions of perjury, bribery, larceny, arson, circumstantial evidence, direct evidence, and indictment are asked for, and the juror is questioned as to his scruples about inflicting the death penalty or rendering a verdict of guilty on circumstantial evidence. Of course, it is not easy for a person with an untrained mind or a limited knowledge of English to give answers to some of the questions that shall meet the demands of logic, rhetoric, or grammar. In fact it is not so easy a task for any person of fair intelligence and a good command of English, to give offhand a definition of some of these terms. But it is not essential that such answers shall be given. It is sufficient if the replies indicate that the person knows what the term means even though he cannot aptly express it. But after making all these allowances it is amazing to glance over the thousands of examination papers and see how many people, English-speaking, long resident of this country, engaged in business for years, and after having previously sat as jurors, who have not the faintest idea of what some of the common legal terms denote.

Odd Answers.

Many of the answers on file are curious and amusing. Perjury has been defined as "obtaining money or goods by fraud," "just like stealing," "make out false name or false paper," "a firebug," "saving money in the ward," "'sault,"

By Courtesy Rochester (N. Y.) Herald

A SUPREME COURT JURY DRAWN UNDER THE JURY COMMISSIONER SYSTEM.

These jurors served in a recent murder trial in which the accused was convicted. Five of them are farmers, the occupations of the others being photographer, painter, fireman, automobile supply dealer, engineer, grocer and merchant. The man at the extreme left is a court attendant.

"having more women than men wanted," "having two wives or more," "if I don't go to work I am compell by law," "signing papers."

Bribery has been declared to be "claiming goods that do not belong to you," "setting fire to a house," "there is a grand jury and other jury," "goes higher than $25," "using any wrong power against the law."

An indictment has been alleged to be "a dead man," "man finds," "swearing false," "crime," "those over $25," "made by a justice of the peace," "if I owe a man so much money that makes me indicted," "nothing at all."

Circumstantial evidence has been said to be "testimony from eye-witnesses," "swear to the truth," "depends on which side the case stands," "somebody shoots man and nobody knows."

One man thought direct evidence "was evidence given by the prisoner;" another defined the duties of a grand jury as "be there on time," while others declare that "a man is indicted at the close of his trial," or that "when indicted he is brought into court for sentence."

Think of dumping such trash as that into a jury panel, yet that very thing was done year after year without remedy.

Training Jurors.

But much of this unpromising material I am loth to let go. I frequently devote a few minutes to the work of educating them to become jurors. It does not take some of them very long to acquire the elementary knowledge necessary to qualify them. Once they have that, their good common sense and intelligence will help them over the rest of the way. But when a man comes to me who has sat in a jury box for weeks at a time, and then defines perjury as "stealing," and says he cannot understand the question about scruples with regard to inflicting the death penalty, I consider that time is thrown away on such a man.

Keeping up the Lists.

Constant vigilance is necessary to keep the jury list in shape so that it is of value. There are changes going on all the time. Good men who were on former lists have left town. This man has fallen from

grace and would not be a fit man for jury duty now. That man had a change of heart, and has decided that he would not convict on circumstantial evidence. We have to make almost a house to house visitation to find the new people who have moved in or bought property or who have inherited property by reason of death, or by devise, and to keep our list free from the dead, insane, and those that become infirm or incapable of serving by loss of property or otherwise.

To do this work thoroughly we are obliged to watch each of the newspapers, the transfers in the county clerk's office, deaths reported to the health office, and the directories, for those who leave town, change their business, or move to other cities, or from ward to ward; and we must go into the country direct to find the changes which are constantly going on there.

Lists Consulted by Counsel.

The knack of getting a desirable jury seems to be a matter of intuition with some lawyers; but while they may have great luck in exercising this valuable faculty, it is by careful examination of jury lists, and the application of practical rules, that an attorney most commonly seeks to get a jury which is apt to be unbiased toward his side of the case. A man's qualifications mentally, morally, and industrially may be followed with remarkable accuracy through the examination papers.

As a result of this inspection juries are now quickly made up from the panels, and the county is saved the large expense incident to long delays in selecting a jury.

The Jury System.

One of our ablest justices of the supreme court, Honorable William Rumsey, whose father had occupied that position before him, said some years ago: "I am a firm believer in a trial by jury to the very furthest extent. In my experience of nearly fourteen years, I have had very few verdicts which I was not satisfied with, very few indeed, and in one or two instances I have ascertained by considerable examination that the verdict that I was not satisfied with I ought to have been satisfied with. . . . I never shall forget the remark my father made to me on the subject, and, as you all know, he had considerable experience. I was sitting one day in the library, examining a motion for a new trial upon the ground that the verdict was against the evidence. I had been hard at work at it for some hours, and finally threw the affidavits down with an exclamation of dissatisfaction and impatience. My father, who sat in the room, said: 'What is the matter with you?' and I told him my difficulty. He said, 'Well, probably the jury were right.' He went on to say: 'I have, as a lawyer and judge, been trying cases ever since 1831, and I will tell you that I believe that the wit of man never devised so perfect a way to get at the truth of a question of fact as the verdict of a petit jury.' I believe he was right about it. I have told that story to a great many men, and I never found an old judge or an old lawyer who did not agree with it."

If we can keep our jury panels filled with men whose mental and moral standing qualify them to discharge the important duties of jurors, we have gone a long way toward rendering the machinery of human justice as exact and impartial as possible.

Proposed Reforms of the Jury System

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PERHAPS no single institution of our country has been more highly praised, or more vigorously denounced, than the jury system. By its admirers it has been called the palladium and bulwark of our liberties; and they point with pride to the many instances when juries have stood for the liberty of the subject, against time-serving judges who sought conviction at the behest of their royal master, who wished to bring to ruin some too independent subject who blocked the path of despotism. Its opponents cite instances where juries have been as truckling and subservient as the judges, and one humorist ridiculed it as the "bulwark in which John Bull can walk triumphantly, the clothes-prop of our liberty, the cloak-pin of law, and the hat-peg of equity." They say that whatever useful purpose it may have once served in protecting the rights of the people has long since passed away; that judges, being elected by the people, are as much their representatives as the jurors, and are no more likely to attempt to oppress them, or disregard their rights.

The friends of the jury system claim that on questions of fact the judgment of twelve men drawn from all walks of life is better and safer than that of any one man, however learned, as their aggregate experience will be greater, and they will not look at questions from so narrowly technical a point of view. Its detractors say that this is an age of specialization, that jurors, being picked up haphazard, have no training in weighing evidence and detecting perjury and fraud, while this training is possessed by judges both because of their experience on the bench and their previous training in active practice at the bar. Among American judges who have spoken highly of the ability of juries to weigh facts are Judge Miller, of the Supreme Court of the United States;[1] Judge Dillon;[2] Judge Caldwell, of the United States district and circuit courts for the eighth circuit;[3] Judge Story;[4] Judge Cooley;[5] Judge Woodbury;[6] Judge Brawley, of the United States circuit court of appeals;[7] Judge Hopkinson, of the Federal district court;[8] Judge Willard, of the New York court of appeals;[9] Judge Smith, of the New York court of appeals;[10] Judge Gill, of Texas court of civil appeals;[11] Judge Chase, of the New Hampshire supreme court;[12] Judge Whelpley, of New Jersey court of errors and appeals.[13]

Among English judges are Lord Penzance,[14] and Lord Tenterden;[15] and among Canadian judges, Judge Weatherbe, of the Nova Scotia supreme court;[16] and Chief Justice Armour, of Ontario.[17]

And, on the contrary, the competency

[1] The System of Trial by Jury, 21 Am. L. Rev. 859.

[2] The Laws and Jurisprudence of England and America, Lecture IV., p. 122.

[3] Myers v. Chicago, St. P. M. & O. R. Co. 37 C. C. A. 137, 95 Fed. 406, 414.

[4] Dexter v. Providence Aqueduct Co. 1 Story, 387, 394, Fed. Cas. No. 3,864.

[5] People v. Garbutt, 17 Mich. 9, 27, 97 Am. Dec. 162.

[6] Tufts v. Tufts, 3 Woodb. & M. 456, 469, Fed. Cas. No. 14,233.

[7] Travelers' Ins. Co. v. Selden, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285, 287.

[8] United States v. Ingersoll, Crabbe, 135, Fed. Cas. No. 15,440.

[9] Wood v. Hubbell, 10 N. Y. 479, 481.

[10] Willis v. Long Island R. Co. 34 N. Y. 670, 679.

[11] Gulf, C. & S. F. R. Co. v. Holland, 27 Tex. Civ. App. 397, 399, 66 S. W. 68.

[12] Smith v. Boston & M. R. Co. 70 N. H. 53, 85 Am. St. Rep. 596, 47 Atl. 290.

[13] Black v. Shreve, 13 N. J. Eq. 455, 469.

[14] Ginger v. Ginger, L. R. 1 Prob. & Div. 37.

[15] R. v. Burdett, 4 Barn. & Ald. 95, 162.

[16] Marks v. Dartmouth Ferry Commission, 36 N. S. 158, 163.

[17] Robinson v. Toronto R. Co. 2 Ont. L. Rep. 18, 20.

of jurors as triers of fact has been strenuously denied in many magazine articles, and in papers before bar associations, among which may be mentioned an article by William L. Scott, in 20 Am. L. Rev. 661; one by S. M. Bruce, in 40 Am. L. Rev. 222; one by Hal W. Greer, in 42 Am. L. Rev. 192; one by A. T. Brewer, in 5 Mich. L. J. 50; and a paper read by John W. Hinsdale, president of the North Carolina Bar Association, at the annual meeting of the association, in 1910. Even some of those who concede that juries are capable of ascertaining the truth assert that their prejudices prevent them from rendering just verdicts, especially when large corporations are parties litigant against an individual, as their sympathies lead them to give the former the worst of it regardless of the evidence. But, on the other hand, many think, as one writer said: "Since, 'wealth has accumulated, and men decayed,' we have noticed a hue and cry raised by corporations and their representatives more especially against the jury trial. To such, the jury trial is an 'inherited burden.' Some of their legal rights are morally indefensible, and hence they hate and fear juries. These haters of juries are usually the jury fixers. They inaugurate rascality secretly, denounce it openly, by charging it to the jury system, and clamor for the one-man power of a court. Judges are but human, and while they are usually worthy men, it must be conceded that there is well-grounded fear among the common people, that we are nearing the days when government by injunction is becoming too common. Abolish the trial by jury, and the restraint of the direct power of the people on the judges would diminish in proportion to the increase of man's disposition to tyrannize." [18]

Those who are opposed to the present system are not united as to what should be substituted. Some would have a single judge decide, as is now the rule in equity and admiralty cases, and argue that questions of fact in such cases are at least as intricate and difficult as cases at law, and that judges are just as competent to decide the latter as the former. Others would substitute three or more judges. Others would have elective or appointive juries itinerating from county to county like a judge on his circuit. While still others would combine the two methods, and have two or more of such jurors sit with the judge to form the tribunal for the trial of facts. In England, where juries may be waived, there has been in recent years a remarkable decrease in the number of jury trials in civil cases, the parties usually preferring to try their cases before a single judge.

It is not the purpose of this article, however, to give any elaborate discussion of the question as to whether the jury system should be abolished, because, whatever its merits or defects, so deeply is it rooted in the judicial system of our country, so jealous are the people of the part it enables them to play in the administration of justice, and so great is their natural conservation, that they will not, in this generation, allow to be seriously disturbed an institution so hoary with antiquity. It will therefore be more practically useful to discuss how it may be improved and its defects remedied.

Exemptions.

There are too many exemptions. Many of the classes who are exempt are those best fitted for that important duty. It would be better to repeal all exemptions except attorneys and court officers, and allow the court to excuse in case of extreme individual hardship.

Preparation of Jury List.

The selection of names for the jury list should not be made by the sheriff, as in some states, but by an impartial commissioner or commissioners appointed by the judges, who should take an oath similar to that provided for in a bill now pending in the legislature of Pennsylvania "to make impartial selection of jurors, that he will not permit partiality, favor, affection, hatred, malice, or ill-will in any respect whatever to influence him in the selecting, drawing, and summoning of jurors." This commissioner should have power to summon and examine on oath prospective jurors, touching their qualifications. Not

[18] William D. Totten in 5 Mich. L. J. 119.

all persons not legally ineligible to jury duty should be put on the jury list, but only such persons as are likely to make good jurors on account of good moral character and general intelligence.

Talesmen.

Talesmen should not be called as jurors, as too good an opportunity is thereby afforded to the jury fixer to get in his work, and to the professional juror, who hangs around the courthouse in the hope of being called upon, and earning the small fee he would get as juror.

Restriction of Causes of Challenge.

There are but few men of intelligence, men competent to make good jurors, who, by reading of newspapers or otherwise, have not heard or read in advance of the trial something of the more important cases which come up before the courts; yet because of this knowledge they are the very ones who are most likely to be challenged for cause, and the jury box, in these more important cases which demand the highest intelligence, is likely to be filled by the more ignorant members of the community. A judge is not considered disqualified because he has heard of a case before, and a much more rigid rule should not be applied to a juror. A dishonest juror who is desirous of serving will deny all knowledge or opinion. A juror who has formed or even expressed an opinion based on newspaper reports or on rumors should not be disqualified if he states that he can lay aside such opinion and render a true verdict according to the law and the evidence, and the presiding judge is satisfied that such is the case.

Striking a Jury.

It sometimes happens that one side, having but one peremptory challenge left, does not exercise it, although one objectionable juror is left on the panel, lest the next man called may be even more objectionable. To remedy this, more than twelve men should be in the box before either side is required to exercise its last peremptory challenge. If, therefore, there were say fourteen men in the box and each side had one peremptory challenge left, each party could strike out the juror most objectionable to himself, without fear of having another still more objectionable juror substituted, whom he might not be able to have stricken off for cause.

Part of Judge in Trial.

By statute in a few states and by decisions in others, trial judges are forbidden to make any comment whatever upon the evidence, and as a result, cases are submitted to juries without sufficient guidance. Under such a system the judge is little more than an umpire between warring attorneys.

Speaking of such a statute, Professor Thayer said: "It is not too much to say of any period in all English history, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected." The true rule should be as stated by Mr. Justice Gray, speaking for the court in United States v. Philadelphia & R. R. Co. 123 U. S. 113, 31 L. ed. 138, 8 Sup. Ct. Rep. 77: "Trial by jury in the courts of the United States is a trial presided over by a judge, with authority not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination." This is the system in vogue in England and in our Federal courts, and was the ancient form. But to the successful working of this system it is necessary that judges be thoroughly competent, and it is probably true that the judges in England, and the Federal judges, are above the average of this country. The remedy lies in raising the standard of the judiciary. Perhaps one

third of the reversals are because of misdirections to the jury.

But a judge has not done his whole duty when he has given proper instructions. As was said in Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, by Brewer, J.: "The judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

General Instructions to Juries as to Their Duties.

A good suggestion for the improvement of the jury service is made by Henry M. Earle, in the last July number of Bench and Bar. "For personal satisfaction," he had made it a rule to talk to jurors after they had decided a case, to discover what particular points most appealed to them. "This practice soon brought to light two facts: First, the commendable interest and pride of the average juror in meeting the responsibilities of his position, and at the same time his ignorance of the proper functions of a jury and of its real relation to the rest of the machinery of the law. Frequently the view was taken that the jury has absolute power to determine the case on supposed principles of equity, or even charity; and occasionally the court's charge has been openly rejected on the theory that the court was merely following a meaningless formality." To remedy these and other misapprehensions, some of which never come to light, he would have the jury commissioners or county clerk, as the case may be, furnish to prospective jurors printed instructions, outlining their duties, stating the part they play in the judicial machinery, and what they may and may not do. He would have the judge refer to the instructions, asking if they are understood, and furnishing such further information as he might deem necessary. The proposed instructions are given in a footnote.[19]

[19] Notice to jurors. The following instructions are issued upon the order of the appellate division. All jurors are required to read them carefully and to be guided accordingly. Any infraction of these instructions may result in punishment for contempt.

The jury is a part only of the judiciary administration, and cannot in any event act independently of the court's instructions.

The function of the jury is to decide such questions of fact as may be submitted to it. Only the evidence actually presented in the case can be considered, and no other fact or circumstance must influence the jury.

The law governing a case is decided entirely by the court, and the jury will be instructed at the end of each case what the law in such case is. All questions of fact are left entirely to the jury, and their verdict must depend solely upon the facts presented, as considered in the light of the court's instructions on the law governing such facts.

It is not the right of the jury to attempt to administer justice as they may see and understand it. The jury must, however, aid in this object by considering attentively, fairly, and intelligently, the evidence and the court's instructions, basing their verdict on the same, and nothing else.

Any juror has a right at any time to ask any questions in relation to the case that he may deem important, but the court will pass upon the propriety of any such question and the answer thereto.

No juror shall, while a case is pending, in any way communicate with anyone in relation thereto, except in the jury room.

Discussions and arguments of counsel in relation to matters of law are not to be considered by the jury, neither are they to consider any evidence that may be improperly given and ordered stricken out.

Any knowledge or information that any juror may have in relation to anyone connected with the case must be considered, unless same is made a matter of evidence and a part of the record. Excusing a juror from service by counsel is entirely proper, and does not indicate any personal objection.

The jury may send to the judge for further instructions or directions, or for papers or exhibits. Any explanation desired in relation to these instructions will be furnished by the trial justice, and any infraction thereof by any juror may result in his summary punishment.

Failure of any juror to act under the foregoing rules may defeat the object of the trial, and necessitate a retrial of the case.

Rule Requiring Unanimity should be Abolished in Civil Cases.

The rule that no verdict shall be rendered unless the jury is unanimous is very ancient, yet our ancestors were not very scrupulous as to how this unanimity was secured. The jury were locked up and kept without meat, drink, fire, or candle until the weaker in body or the less stubborn gave way. The resulting verdict was supposed to be the very truth of the matter. Or, if the jury had not agreed by the time the judge had finished his business in one county of his circuit, they were loaded on to a cart and carried from town to town in the circuit until they agreed. Although such methods of coercing a verdict are now discontinued, and jurors are made comfortable while considering their verdict, there is but little merit in requirement of unanimity so far as civil cases are concerned. The most important questions of law are decided in appellate courts by a majority vote. Some of the gravest questions of constitutional law have been decided in the United States Supreme Court by a vote of five to four. The same thing is true when questions of fact are decided on appeal from the findings of a chancellor. It is not usual in ordinary life to find twelve men to take the same view of any controverted question of fact, unless the facts are very plain, and it is no more usual when the matter becomes the subject of a judicial trial. In case the jurymen are not harmonious, one of two results must follow,—either there is a disagreement, or some juryman yields to the others for the sake of rendering a verdict, though of the same opinion still. If there is a disagreement, a new trial is necessitated, with its consequent delay and expense, irritating to the attorneys and discouraging to their clients. If a verdict is finally reached it is frequently the result of a compromise whereby one juror who thinks that a plaintiff is not entitled to recover at all agrees to a verdict in his favor, for a less sum than would be rightfully his due if he were entitled to recover any sum.

The unanimity rule has been criticized by many eminent men, among others by Hallam, who calls it "that preposterous relic of barbarism;" by Lord Chief Justice Cockburn, who said that "the unanimity rule is responsible for an enormous number of mistrials, loss of time, loss of money, delay in justice. It gives an opportunity to a stupid or prejudiced or corrupt man to stop the wheels of justice;" by Bentham, who said that "the unanimity rule could not have been the work of calm reflection working by the light of experience," and that it is "no less extraordinary than barbarous;" by Lord Campbell, who spoke of it as a logical deformity and gross obstruction to the due administration of justice; and by Cooley, who declared it to be "repugnant to all human conduct, passions, and understandings." Judge Miller, of the United States Supreme Court, said: "I am therefore of opinion that the system of trial by jury would be much more valuable, much shorn of many of its evils, and much more entitled to the confidence of the public as well as of the legal and judicial minds of the country, if some number less than the whole should be authorized to render a verdict. I would not myself be willing that a bare majority should be permitted to do this." And Judge Caldwell, of the United States circuit court, in a paper before the Missouri Bar Association, said: "If unanimity were tantamount to infallibility, there would be some reason for the rule, but there is no more infallibility in twelve men than in seven or nine. Its baneful effects on the jury and on the administration of justice are very great. The superstition should be abolished by law."

As suggested by Judge Miller, however, a verdict rendered by a bare majority would not sufficiently command public confidence. He thought that a verdict in civil cases rendered by a three-fourths vote would be as much entitled to respect as if it were unanimous, and would as nearly approach perfect justice as the fallibility of human nature permits. An incidental advantage of the change would be that it would be impracticable for the jury fixer to get in his work, since he would have to buy at least four votes to hang the jury, and he would soon find himself with his occupation gone.

But to insure full discussion and consideration, there should be a provision that the three-fourths rule shall not apply until the jurors have been out for a certain length of time, say three hours, without reaching a unanimous verdict. This would give the minority time to present their views and arguments and to convince the majority if they can, but not by bull-headed obstinacy to coerce them.

Abolish Jury of Vicinage in Certain Cases.

The old rule of the common law, that a man was entitled to be tried for any crime by a jury of the vicinage, was logical and necessary for the security of the subject. Anciently, jurors were chosen because they had personal knowledge of the facts, and of the parties concerned, especially of the defendant. The functions of jurors and witnesses were merged. But this reason has passed away, as now jurors are chosen because they know nothing of the matter, and have formed no opinions. But in these days, when almost everybody reads newspapers, it is difficult to find intelligent jurors who know nothing regarding important criminal cases pending in their county, or who have formed no opinions with regard thereto. And so rigidly is the rule of exclusion usually enforced that the men best qualified to try the case intelligently are excluded, and the jury box is filled with men who are too ignorant and stupid to take an interest in the world around them, or who are too lacking in public spirit to take an interest in the affairs of the community. Owing to the difficulty of getting an impartial jury, at almost every criminal case of any notoriety, days and even weeks are consumed in the preliminary steps of securing a jury, and many panels have to be summoned before a jury is finally secured. The rule requiring a jury of the county should be so far modified as to allow the presiding judge in a criminal case, in which it will probably be difficult to obtain impartial jurors owing to the notoriety of the case, to transfer it to some adjoining county, or to some other county of his circuit, even against the objection of the defendant.

The ancient rule requiring a jury of the vicinage had formerly also its justification in the fact that it was necessary to protect the subject from the arbitrary caprice of the Crown, should the latter wish to get rid of or punish one guilty of no offense save that of being too independent. But this reason is now inapplicable in a Republic where all public officials, including judges themselves, are elected by the people. Speaking on this subject, Judge Miller said: "The absurdity of this part of the system, both as regards a jury of the vicinage and the qualifications of the individual jurors, needs no comment or argument. It simply remains because it is a fixed part of the law which the court cannot change, and which no legislator has grappled with or has had the courage to attempt to modify."[20]

[20] 21 Am. L. Rev. 867.

A Defense of the Jury

BY SAM. M. WOLFE, ESQ.

Of the Anderson (S. C.) Bar.

OTHING definite is known as to the origin of the jury. Bourguignon, in his *Memoire sur le Jury*, says: Its origin is lost in the night of time. Adam, in his Treatise on Trial by Jury in Civil Causes (in Scotland), says that in England it is of a tradition so high that nothing is known of its origin; and of a perfection so absolute that it has remained in unabated rigor from its commencement till the present day. Spelman was uncertain whether to attribute the origin of the system to the Saxons or to the Normans. Du Cange and Hicks accredit its introduction to the Normans, who, they tell us, borrowed the idea from the Goths. Blackstone, in book III. of his Commentaries, speaks of it as a trial that "hath been used time out of mind, and which seems to have been coeval with the first civil government." Meyer, in his Origin and Progress of the Judicial Institutions of Europe, regards the jury as a modification of the Grand Assize under Henry the II., and as partly a semblance of the feudal courts erected in Palestine by the Crusaders. And he fixes the reign of Henry the III. as the era of its introduction into England. The civil jury seems to have antedated the jury for criminal offenses, which Sir Francis Palgrave, in his Rise and Progress of the English Commonwealth, ascribes to the coming of the Conqueror. Stephens, in the third book of his Commentaries, traces the germ of the jury to the old Scandinavian courts, where the number twelve was so distinctively observed. Then we must conclude that trial by jury is certainly very ancient; that its present form can be assigned to no one period or nation, but that it is more probably an outgrowth of centuries of experience and a product of social changes and development. Its prototype cannot be said to have been the *Dicasts* at Athens, nor the *Judices* at Rome, nor the *Thing* of the Norsemen, nor the *Mallum* of the Germans. The idea that a man should not be condemned, nor his property or liberty deprived him, save by the voice of his fellows, is shown to have had its birth in almost every instance with that of civilization itself.

Value of the Jury System.

But the fact of its antiquity alone should not be sufficient argument for its retention and indorsement. Let us therefore see if its merit warrants its having been handed down to us through the ages. It is essentially a child of freedom. Where the sceptor of the tyrant rules, it has no home. The system was inaugurated in the effort to thwart the power of the despot. It is the greatest safeguard of liberty, and the greatest protector of its privileges. Instance that blessed one,—the liberty of the press. Point out the editor who would advocate popular rights if over him hung the pall of a monarch's mandate, instead of the assurance of having the question of his guilt under a charge of libel submitted to a jury of his fellows.

Again, trial by jury is a great fosterer of the Golden Rule. The right of being tried by his peers taken indiscriminately from about him, who feel neither malice nor favor, but who must decide from what they believe to be the whole truth, gives to every man the hope that he would be dealt with impartially, and the desire to mete unto those concerning whom he must give a verdict, the same degree of justice.

Jury Service and Citizenship.

The trial by jury is a factor in the making of good citizenship. To qualify as a juror, a man must qualify as an elector. To qualify as an elector a property or educational qualification is often requisite: he must be a *good* and *true* citizen. He knows that he is liable to be

called to one of the highest offices in the judicial polity,—that of arbiter between man and man, or citizen and state; the weigher of differences involving the most sacred rights of his brother. Moreover, says De Tocqueville, it is the most potent instrument in the education of the classes. He calls it a school in which admission is always free and in which each juror enters to be instructed in his legal rights; where he engages daily in communication with judges and advocates most learned in the law. The frequency of being made to promise to lay aside anger, hate, and, under the sacredness of an oath, to impartially administer his duties, must necessarily improve the general tone of the citizen. That a man may serve as a juror impresses him more than any other one phase of his citizenship with his part ownership in the government. It makes him more diligent to know its laws, and more zealous to observe and enforce them.

Popularity of Jury System.

Is it any wonder that every nation, however much it may have differed in respect to its other institutions, has ardently sought the establishment of the jury system? And that the oppressed of every people have put it in the van of their demands in all revolutionary movements? We find in the Magna Charta, chapter 29, that no freeman shall be hurt, in either his person or property, *nisi per legale judicium parium suorum vel per legem terre* (unless by the lawful judgment of his peers or by the law of the land); and two hundred years before, under Conrad: *Nemo beneficium suum perdat, nesi secundum consuetudinem ancessorum nostrorum et per judicium parium suorum* (No one shall be deprived of his property save by the custom of our predecessors, and by the judgment of his peers).

Abolition of Trial by Jury.

Those who cry, abolish the jury, are like men who, having grown accustomed to a privilege, no longer value it. They find it easy to decry this venerable institution, but extremely difficult to suggest anything to replace it. Dissatisfaction with the jury system is not a matter of modern years; it is as old as the system itself. Nor is dissatisfaction peculiar to the institution of the jury, it is common to every human institution; and it is simply due to the recognized imperfection of every human institution. That we are able to see the imperfection, and yet are unable to correct it, is but one of the many ways in which we are reminded of our human frailty.

The Unanimity Rule.

Some say, abandon the unanimity rule. Then must we leave the matter of a man's conviction, which may mean his being hanged, to an arbitrary number? If a fixed number less than twelve, why seven or nine or eight any more than twelve? Listen to these proverbs: There is safety in a multitude; the fewer may the more easily deceive or be deceived; it is natural for man to err; no one is without fault, and the surest foot may slip. Our law requires that to prove the guilt of the accused it must be shown beyond a reasonable doubt. If we abolish the unanimity rule, we may also abandon this requirement; for rarely, if ever, does the state or commonwealth fail to get the concurrence of twelve men, and hence a verdict where it has succeeded in proving its case clearly and conclusively. Besides the unanimity rule, too, has its sanction in antiquity.

Number of Jurors.

Let it here be noted that the functions of the jury has not ever been that of triers of the fact, but originally they were the witnesses of the fact, and twelve witnesses was the number the ancient Scandinavian and other courts regarded as a safe number upon which to base the conclusiveness of guilt. Coke says (1 Co. Litt. p. 155): "It seemeth to me that the law in this case delighteth herselfe in the number of twelve; for there must not onely be twelve jurors for the tryall of matters of fact, but twelve judges of ancient time for tryall of matters of law in the exchequer chamber. Also for matters of state, there were in ancient time, twelve counsellors of state. He that wageth his law, must have eleven others with him who thinke he says true. And that number of twelve

is much respected in Holy writ." We find that there were twelve Apostles, twelve stones upon which the heavenly Hierusalem was built, twelve discoverers sent into Canaan to seek and report the truth, and twelve scribes. The Supreme Court of the United States, in the case of Thompson v. Utah, 170 U. S. 349, 42 L. ed. 1066, 18 Sup. Ct. Rep. 620, has declared that a trial by jury is necessarily a trial by twelve jurors. And the Constitution has preserved the right to us inviolate. Some exceptions to the rule have been made in a few of the states in the trial of civil cases, and, in still others, the rule has been and may be suspended in even criminal cases by the mutual consent of the state and the accused, but in no state has the rule been abrogated by constitutional law, nor in any instance disregarded, where the penalty for the crime was death. Much fault is found with the methods of securing the venires, and yet it is doubtful whether any other method would accomplish better results, to say nothing of the endless confusion which would be incident to its inauguration.

Too prone are we to dissociate the jury from the rest of human kind, and to clothe it with attributes of the supernatural. Analyze any phase of the jury system, or any theory advanced for its betterment, and you find yourself face to face with *man*: a being possessed of organs, dimensions, and all the frailties common to the human race. And herein lies the keynote to the situation. It isn't legislation we need, but *men*. It isn't reform we need, but *manhood*: *manhood* in the jury, *manhood* before the jury, *manhood* on the bench. If better results are expected, then look to the man.

What did Edmund Burke mean when he said that the greatest object of civil government was to get twelve honest men into the jury box?—That principle, inwrought with every jurisprudence, from the Twelve Tables down, which gave the Athenian, and has given the meanest culprit ever since, the right to say, "Strike, but hear me!"—Roscoe Conkling.

Knowledge of Facts of Cause as Affecting Competency of Juror

BY JOSEPH T. WINSLOW, ESQ.,

Of the Massachusetts Bar

WHETHER the mere fact that a prospective juror has knowledge of facts involved in the cause to be tried will, apart from any bias or opinion, disqualify him from serving, is an interesting question, which in a number of cases, has received the attention of the courts.

Ancient Doctrine.

It is common knowledge to members of the legal profession that, according to the ancient doctrine, not only did personal knowledge of the facts of the case on the part of a juror not disqualify him from serving as a member of the jury, but such knowledge was held to be an essential to qualify him to act.

This requisite of knowledge as a qualification under the ancient system is accounted for when we remember that the jury's verdict in those days was rendered upon the facts within their personal knowledge, as well as upon such other evidence as might be introduced. It was for this reason, also, that the system of choosing jurors from the vicinage existed, a reason, which, like many others accounting for peculiarities in our law, has long ceased to exist.

Concerning the right of jurors to determine cases upon their own knowledge, and explaining some of the causes which led to the abandonment of basing verdicts upon their unsworn knowledge, we read in 3 Bl. Com. 374, as follows: "As to such evidence as the jury may have in their own consciences, by their private knowledge of facts, it was an ancient doctrine that this had as much right to sway their judgment as the written or parol evidence which is delivered in court. And therefore it hath been often held that, though no proofs be produced on either side, yet the jury might bring in a verdict. For the oath of the jurors to find according to their evidence was construed to be, to do it according to the best of their own knowledge. This seems to have arisen from the ancient practice of taking recognitions of assize, at the first introduction of that remedy; the sheriff being bound to return such recognitors as knew the truth of the fact, and the recognitors, when sworn, being to retire immediately from the bar, and bring in their verdict according to their own personal knowledge, without hearing extrinsic evidence or receiving any direction from the judge. And the same doctrine (when attaints came to be extended to trials by jury as well as to recognitions of assize) was also applied to the case of common jurors; that they might escape the heavy penalties of the attaint, in case they could show, by any additional proof, that their verdict was agreeable to the truth, though not according to the evidence produced; with which additional proof the law presumed they were privately acquainted, though it did not appear in court. But this doctrine was again gradually exploded, when attaints began to be disused, and new trials introduced in their stead. For it is quite incompatible with the grounds upon which such new trials are every day awarded, *viz.*, that, the verdict was given without, or contrary to, evidence. And, therefore, together with new trials, the practice seems to have been first introduced which now universally obtains, —that, if a juror knows anything of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court."

Thus gradually this old system disappeared and, under the new, knowledge of the facts of the cause to be tried no

longer constituted a necessary qualification for acting as a juror, but, as we shall presently see, the information which under the former system had constituted a qualification, under the new, in certain instances, disqualified him.

Modern Rule.

Facts Learned by Hearsay.

It seems hardly necessary to state that knowledge of facts relative to the cause to be tried which the juror has gained through hearsay will not disqualify him where he has not formed a fixed opinion, or is not biased thereby to such a degree that he cannot act impartially in the cause.

Thus in a Kansas case [1] the fact that a juror had heard detailed statements of the killing was held not to disqualify him in a trial for murder, although he remembered them. The court, in this case, said: "If no person were to be deemed a competent juror who had listened to statements, more or less detailed, from a woman, or had read such statements in a newspaper, we apprehend that it might frequently result in a complete failure of justice, from the extreme difficulty of finding jurors. This court cannot hold as a matter of law that a person summoned as a juror is disqualified to sit as juror in a criminal case from the mere fact that he has listened to statements from his neighbors purporting to be a detail of the occurrence, which is all that appears in this case."

So, having heard some talk about the murder for which defendant is to be tried, at the time of its commission, does not disqualify a juror, notwithstanding that at that time he had formed some opinion concerning the case.[2]

And one who has heard detailed statements as to the commission of the alleged violation of the prohibitory liquor law by the defendant is not disqualified because of such knowledge.[3]

Again the fact that he had heard of the accident in which plaintiff's deceased was killed, and had heard people talk about the matter, will not render him incompetent.[4]

And the fact that a juror has read an account of the case in the newspapers, where he remembers no part of it, and states that the reading made no impression on his mind, will obviously not disqualify him.[5]

Nor does the fact that he has "heard about the case" preclude him from serving in a trial for murder.[6]

But the fact that a juror has conversed with one of the parties to the cause will disqualify him.

Thus where he had been approached by the plaintiff and others, who stated that the defendant was trying to cheat the plaintiff out of her money, he was held disqualified.[7]

And where the juror was on intimate terms with the defendant, who was his customer, and who had explained the nature of the plaintiff's claim, and given his "view of the facts," and had explained away the articles in the newspapers, and the talk about the charge made, a challenge will be sustained.[8]

It may be suggested in connection with these cases where the juror's knowledge was gained through hearsay that, although the matters of which he has heard may relate to material facts involved in the cause, they are of much less weight than they would be had they been obtained by him at first hand, since the impression made by a mere recital of the facts could not ordinarily be expected to make an impression upon his mind equally strong and lasting with that conveyed through personally seeing or hearing the happenings, or matters in controversy.

Personal Knowledge of Incidental and Collateral Facts.

It may be stated as a general rule that a juror's personal knowledge of in-

[1] Rov v. State, 2 Kan. 405.
[2] Lyles v. Com. 88 Va. 396, 13 S. E. 802.
[3] State v. Bane, 1 Kan. App. 537, 42 Pac. 376.
[4] Chicago, B. & Q. R. Co. v. Perkins, 125 Ill. 127, 17 N. E. 1.
[5] State v. Craft, 164 Mo. 631, 65 S. W. 280; Gradle v. Hoffman, 105 Ill. 147; State v. Lewis, 181 Mo. 235, 79 S. W. 671; People v. Summers, 115 Mich. 537, 73 N. W. 818.
[6] State v. Howard, 17 N. H. 171.
[7] United States Rolling Stock Co. v. Weir, 96 Ala. 396, 11 So. 436.
[8] Catasauqua Mfg. Co. v. Hopkins, 141 Pa. 30, 21 Atl. 638.

cidental facts relative to the cause, or such facts as are collateral to the material issues, or facts that he will not be called upon to decide, will not disqualify him from sitting in the case.

It has been held in a Missouri case,[9] that some qualification must be put on the term "material" in determining whether a juror is disqualified by reason of his knowledge of facts. The court here said: "There must, we think, be some qualification placed upon the term 'material,' to enable justice to be administered without great inconvenience. What that qualification ought to be, and what class and character of allegations of facts may be considered immaterial within the proper meaning of the statute, is not so easy to define. It is more easy to decide cases as they arise, than to lay down in terms any fixed or clear rule to govern all which may occur. Venue is necessary to be laid and proved in every indictment for crime. It is material to the prosecution to establish that the crime alleged was committed at a place within the county, for this is essential to the jurisdiction of the court. Does the knowledge that the alleged locality of an offense is within the county named in the indictment disqualify a juror from sitting on the case? We see at once that this fact, material as it undoubtedly is to the success of the prosecution, has no connection whatever with the guilt or innocence of the party accused, and that it is a fact known probably to nine tenths of the inhabitants of the county, and therefore in all probability will not be controverted on the trial. In an indictment for murder, the fact of the killing is an essential of crime; but would a man, who accidentally was present at the burial of the murdered person, and saw his dead body, and knew him when alive, be excluded as an incompetent juror on the trial of the supposed manslayer? Such facts as we have referred to are material in one sense. They constitute the basis of the prosecution, but they are independent facts, having no bearing on the question to be tried of the guilt or innocence of the accused. They are just as consistent with the guilt of any other person as they would be with the guilt of the accused; and their establishment does not make a single step toward a conviction."

The rule that knowledge of collateral facts does not disqualify a juror has been applied where the person in question knew that his brother had previously owned the cattle which the accused was indicted for stealing, and also knew that the brother had sold them to the prosecutor, the allegation as to the ownership of the cattle not being controverted in the case.[10]

So, the fact that one has been told the details of a murder, for which accused is to be tried, and that a party has pointed out to him the place where the shooting occurred, the location of the parties at the time of the alleged murder, and the place where deceased had fallen, and where defendant lived, does not disqualify him as a juror, the statements being as to undisputed facts, and such person having formed no opinion.[11]

And in an action where the question before the court was whether those who had heard the evidence in another cause arising out of the same transaction were competent to sit as jurors, the court in discussing the competency of a juror and challenge for favor said: "As an illustration of this point, I put the case of trespass *quare clausum fregit*. The plea is 'not guilty.' Possession is an essential fact of the plaintiff's cause. Surely a juror who had actual knowledge of the possession would not be disqualified. Again, an illustration might be drawn from the practice in criminal cases, where the discretion of the trier of the validity of a challenge for favor is not so large. Thus, in a trial for murder, upon a plea of not guilty, a juror would not necessarily be disqualified, although he had personal knowledge of the death of the person alleged to have been killed, and that the killing was murderous."[12]

And the fact that a person was acquainted with a testator before his last sickness, and prior to the time that his mind was alleged to have become weak, and subject to undue influence, will not

[9] State v. Martin, 28 Mo. 530.

[10] Ibid.

[11] State v. Geier, 111 Iowa, 706, 83 N. W. 718.

[12] Dew v. McDivitt, 31 Ohio St. 139.

disqualify him from sitting in an action to contest the will, where the juror did not see the testator during his last illness.[13]

So, the fact that a juror, in an action for damaging timber by fire, has passed ever the burned district, but does not know the cause of the fire, or the extent of the loss, and has formed no opinion regarding these matters, will not disqualify him from acting.[14]

And the fact that one was subpœnæd as a witness to prove the value of hay and grain, and the expense of keeping cows, and was paid his fee, although he did not appear to have been called upon to testify, and it did not appear that he was interested in the case or had any knowledge of the facts or questions in controversy, will not render him incompetent.[15]

And in a prosecution for the violation of a local option law, although the existence of the law is a fact to be proved, the sufficiency of such proof is for the court, and not for the jury; and the fact that a juror states that he understood that such a law was in force, or that he knew that a local option election was held, and that the result of the election was to supersede the general law respecting the sale of intoxicating liquor, will not disqualify him.[16]

And where the only facts within the knowledge of a juror are derived from a statement made in his presence by the prisoner who, when asked if he demanded a trial, said that he supposed that he was guilty, it was held in a New York case,[17] that the juror was not disqualified, he having stated that he could render a verdict according to the evidence. The court said: "It would be impossible to administer justice under such a rule, for at every moment that the juror was in the court room, from the opening of the case until the closing of the trial, something would occur in the proceedings of the court that could not fail to make an impression of some sort upon an intelligent mind. But, so long as a juror could render a verdict according to the evidence, he was competent. It was only when he had such a bias on his mind that he could not decide fairly, or would not be likely to do so, that he was disqualified. But in this case there was another consideration: There was no doubt, it would seem, that the prisoner had committed a homicide,—of that he had confessed himself guilty; but the real question which the jury was to try was whether that homicide was murder or manslaughter; and upon that point the prisoner had made no confession."

Personal Knowledge of Material Facts.

Generally speaking personal knowledge by jurors of such material facts as will tend to bias their opinion will render them incompetent to serve, and this rule has been applied even though the juror had asserted that he was unbiased, and could act impartially upon the trial of the cause.

In a Washington case,[18] the question was as to the competency of one whose name had been indorsed as a witness on an information brought against another for causing the death of a person by reckless driving. He was introduced as a witness later in the case, and testified as to defendant's reckless driving immediately before the commission of the offense. The court said: "When the facts, however, are material to a conviction, as in this case proof of wantonly, negligently, recklessly, and wilfully driving a team over the public roads, thereby causing the death of a person, we think the knowledge of such driving immediately preceding the commission of the offense was material, and a juror possessing the same cannot be said to go into a jury box in that state of mind in which the law contemplates a juror shall be when called upon to try one accused of a crime. Such a juror cannot be said to be an impartial one, notwithstanding he says he is."

It appears that in this state it is not allowable to permit a juror on his *voir dire* to disclose the facts within his knowledge, and had he in this case not

[13] Delaney v. Salina, 34 Kan. 532, 9 Pac. 271.

[14] Burlington & M. R. Co. v. Beebe, 14 Neb. 463, 16 N. W. 747.

[15] Rankin v. Nelson, 27 N. Y. Week. Dig. 348, 10 N. Y. S. R. 337.

[16] People v. Keefer, 97 Mich. 15, 56 N. W. 105.

[17] People v. Campbell, 1 Edm. Sel. Cas. 307.

[18] State v. Stentz, 30 Wash. 134, 70 Pac. 241, 63 L.R.A. 807.

been used as a witness it would not have appeared from the record that he had knowledge of material facts connected with the cause, yet the defendant would have been subjected to the same prejudice.

So, a new trial has been granted where it appeared that one of the jurors in a murder trial was at the scene of the crime either at the time of its commission or immediately thereafter, and located the wound on the deceased, and was personally cognizant of the salient features of the case.[19]

And on a trial for an assault with intent to kill, where a juror, who was eating dinner in a room adjoining that in which the defendant did the shooting and heard the shots, jumped up, ran out, and saw the defendant running, or going at a fast walk up the street with a smoking pistol in his hand, it was held that he should have been rejected upon defendant's challenge for cause, notwithstanding that he stated under oath that he could try the cause impartially.[20]

In an Alabama case,[21] where the question was as to the right to challenge prospective jurors who had been summoned and sworn as witnesses, the court said: "A person under indictment is entitled to a public trial by an impartial jury, and they are not to be regarded as unbiased who have such a knowledge of the transaction out of which the prosecution arises as to be able to testify to matters which tend to show him guilty."

So, in a Louisiana case,[22] the court said: "A legal presumption of bias arises when the juror has had a previous knowledge of the cause, by being one of the witnesses to the deed (Co. Litt. 157 a); or, if he have been informed of, or treated of, the matter, this is a principal challenge."

And it has been laid down that where a biased opinion may be inferred from knowledge of facts, or from any other source of information, the juror may be challenged, since it is not the source of information which controls, but the opinion.[23]

And where the wife of a juror's brother was a sister of the plaintiff, and the juror stated that he knew a good deal more about the case than he ought to, and that he had some bias and interest in the case because it interested his friends, he was held disqualified, apparently, however, more because of his bias than the knowledge of facts.[24]

General Deductions.

From the foregoing cases, as to the effect upon the competency of a juror of knowledge by him of facts involved in the cause to be tried, the following general conclusions may be drawn:

A juror's hearsay knowledge of facts concerning the cause will not generally disqualify him from acting, although where he has conversed with the parties to the case or those connected with them, he has been excluded because of this fact.

So, personal knowledge on the part of a juror of incidental facts, or those collateral to the material issues of the cause, or as to facts which he will not be called upon to decide, will not render him incompetent.

But where he has such knowledge of material facts as tend to bias his opinion, he is held to be incompetent to sit in the trial of the cause, although he swears that he nevertheless stands unbiased. In the final analysis, the question of competency seems to rest in the sound discretion of the court, and if the inference is strong, or the presumption great that the knowledge on the part of the juror is such as will affect the verdict, a challenge for cause should be sustained.

[19] Nelson v. State (Tex. Crim. Rep.) 58 S. W. 107.
[20] Vance v. State, 56 Ark. 402, 19 S. W. 1066.
[21] Atkins v. State, 60 Ala. 45.
[22] Laverty v. Gray, 3 Mart. (La.) 617.
[23] People v. Vermilyea, 7 Cow. 108; Waters v. State, 51 Md. 430.
[24] Buddee v. Spangler, 12 Colo. 216, 20 Pac. 760.

Indiscretions of a Juror

Reflections of a Victim to a Three Months' Siege

BY JOHN MACY

[Mr. Macy is a former editor of the Youth's Companion. He married Miss Sullivan, the teacher of Helen Keller, and lives in Wrentham, Massachusetts. His article was originally published in the Boston Evening Transcript. It is worth while to take a look at the jury system as seen by this accomplished journalist.—Ed.]

HE aged constable of the town of Fareham accosted me in the postoffice, and, holding a paper under my nose, informed me that I had been drawn as juryman.

I was to report for the civil term of the superior court about to sit at Mortville in and for the county of Wessex-God-Save-the-Commonwealth-of-Massachusetts. From my neighbors I learned that there were various pretexts on which I might ask to be excused. But I was advised that being a literary man (in my town any sort of journalist is a "literary man") I would find the court experience good material. My fellow townsmen are always solicitous about my material. When I fell off the roof and broke my leg, they congratulated me because I could use the experience in a novel. I agreed that a session in the jury box would be good experience whether I ever wrote another word or not. Moreover, I had no excuse to offer the judge, because being a "literary man" I have no honest occupation, no private business which I have a right to regard as important. Finally I consider it dishonest to try to escape public business and throw it on somebody else. I reported at the courthouse.

The Jury.

My fellow jurors were men of many occupations, of all ages, and of a good order of intelligence. It may be that in the cities respectable men shirk the duty, and undesirable job-seekers fill the jury boxes. I doubt if that is true, and I know that no such condition prevails in my county. . . . The panel numbered thirty-odd, and that is a large enough handful of men to insure a good human average. . . . Our jury was well mannered, did not quarrel, was conscientious and laborious in the consideration of cases. There were two or three blockheads (who of course, disagreed with me,—a blockhead is always a man who thinks as you do not), and there were one or two idlers who paid little attention to the cases. The great majority were sensible, honest, hard-thinking men. . . .

In the several arts and sciences there can be specially trained experts. But there can be no trained expert in life. Human wisdom, common sense, fairness of mind, are not found in any one race, grade, class of men; they are virtues peculiar to this and that individual. . . .

Only a few men are sufficiently self-conscious to know the dangers of their own judgments, to be able to turn upon their own intellect and say to it: "Now, old intellect, clogged with myths and emotions and sectarian persuasions, get free as you can from all the lumber that burdens you, and think as clearly as possible about this case which has been given you to decide." Few of us can do that, few have the will to try it. And those few are just as likely to be found in one class of men, in one trade or nationality, as another.

Mary Anne sues grandfather's estate and tries to dispossess some prim old aunts, who think the little hussy is mighty ungrateful. The whole family row comes out in court. Who can settle it fairly? Nobody short of demigods. But a farmer and a blacksmith and a grocer and a motorman know just as much about the mess as forty supreme court judges. Moreover, they have no foolish theories of justice. They go at the problem just as they go at any neigh-

bors' quarrel. Their opinions about the ordinary civil suit are as valid as those of any other men. Do juries give outrageous verdicts? They do. But can any decision of any twelve men compare unfavorably with some of the decisions of Federal judges? We know that one man's judgment cannot be exactly as good as another's. But in practice we cannot tell which is better, for that involves a third judgment,—our own.

Challenges.

A good proof of the inadequacy of human judgment of human judges is the way lawyers blunder when they challenge jurymen. After a few weeks we men in the box get to know each other a little; we think we have "sized up" the habits of mind of the other fellow. The lawyer often challenges the wrong man, just the man who, we think, would be on his side. Lawyers have had long experience in judging jurymen, but they make a bad job of it. . . .

Democracy of Jury.

The jury is the last element of democracy left in the courts. A movement to abolish it or control it may be expected any time. Such movement has already been begun in a subtle way by the politicians of Allegheny county, Pennsylvania. The ten thousand citizens whose names are on the jury lists are being investigated by the authorities. Each man is, or is to be, secretly spied upon by a detective armed with an inquisitorial blank:

Name? Address? Occupation? Age? By whom employed? (a significant question). Industrious? Sober? Intelligent? Can he read and write? Is he fairminded? (an idiotically unanswerable question). Hearing? Physical defects? Reputation? etc.

Now, on the face of it, it may seem a good idea to subject jurymen to close examination. But exactly the same kind of scrutiny should be exercised in the case of judges and lawyers. How would our judges pass the test? Is he fairminded? By whom employed? . . .

Go out in the highways and byways and pick up a jury at random, and the jury system will be safe. When any attempt is made to curtail or modify the broadest system of selection, democracy had better take a look into the courts and see what is happening. Common men are the only kind of men that are in this world. You cannot find twelve uncommon men in our country.

There is one great advantage in the present method of making up the jury list, which people who suspect the intelligence of jurymen do not perhaps consider. School teachers, clergymen, and militia men are exempt. This raises the standard.

The Court.

Much of the foregoing profound philosophy is, of course, far from the experiences of our session of the superior court which sat at Mortville in and for the county of Wessex-God-Save-etc. We had a pleasant little family party. Most of the cases were trifling matters, —somebody trying to get $500 from somebody else, and Lord knows whether he ought to have had it. The presiding judge was Mr. Justice Sheridan, a kind old grandfather, who sat, as it were, at the head of the table and carved the law for us children. Since he has committed the indiscretion of publishing his autobiography, he cannot object to what a juryman says in print. I can never be guilty of contempt of court when he presides, for he is humorous and lovable, and more respectful to jurymen than to lawyers.

The court is a dual personality, or rather it is the union of a person and an abstraction. This union survives from the time when it was necessary to wrap judges, priests, and kings in a sort of superpersonal dignity, to dazzle the populace and keep it abjectly dependent upon a mysterious social mechanism. The court actually is a human forked radish like the rest of us, clad in a frock coat and addicted to the incorrigibly democratic habit of putting its feet upon the desk, so that the toes of its boots are visible above the railing which divides its dignity from the other parts of the court room. When he comes in, a sheriff in sepulchral tones calls: "Co-o-oart!" Then everybody stands up until the court is seated. This is a proper courtesy, but the motive of it is not courtesy. . . .

The motive is traditional respect for authority. Rise! women, children, sheriffs, litigants, witnesses, lawyers, jurymen, and Miss Stenographer; the majesty of the law is in its high place! The plain fact is, Mr. Sheridan, an excellent man, is settin' down. . . .

Usages adapted to one state of society, which linger into a later state, often create an effect precisely the opposite from that obscurely intended when the tradition first arose. Some of the shabby brocade of court etiquette has been cleared out of our courts, such as gowns and wigs. Some that still hangs in faded shreds is dusty, but inoffensive. But some surviving practices are seriously objectionable.

For instance, the outrageous habit of locking jurymen up. Why? During the progress of a civil case which lasts three or four days, jurymen can go home nights. But when the case is given to the jury, the jury must go into continuous session, under lock and key, until it reaches a verdict. There is no sufficient reason why we should not go home at the end of a day, and come back to our work next morning, just as we men do in any other business. The imprisonment of a jury tends to hasty decisions, to the forced verdicts of weary minds incapacitated for thinking. Much better to drop a difficult case, go home, sleep, come fresh to the jury room in the morning, and resume deliberation. If jurymen are in danger of being tampered with after a case is given to them, then they are in equivalent danger of being tampered with during the progress of the case.

The incarceration of the jury is, I hold, against the rights and liberties of citizens. . . . I am willing to give a portion of my time, without pay, to public business; but I resent the turning of the sheriff's key behind my back. I resent having to walk down to the street to supper (or breakfast!) in military or criminal column-by-twos. The judge very often has to spend several days in deciding a question of law. Why not lock him up until his mind works to a conclusion?

Legal Theory.

Law is supposed to be distilled and codified common sense. Law professors tell you so. Two days in court will explode that lofty superstition. . . .

The pompousness of legal theory in the face of a fact betrays its unreason. I was allowed $4 a week for traveling expenses. One week there was a holiday and we served only four days. My allowance for traveling expenses was $5.76. I tried to explain to the county paymaster that I should not have more for four days' expenses than I got other weeks for five days. He looked at me with a slight, noncommittal smile and said in grave tones, "It is a the-ory of the lawr." Eighty cents a day for five days is four dollars; eighty cents a day for four days is five dollars and seventy-six cents. I give it up. The law knows.

Law Language.

Law language is a travesty of style. If we journalists took so long to say things, our space book would be very fat the first week. The next week we should not have any space-book. The editor would have secured us a situation massaging the office windows or splitting wood instead of infinitives. What archaic echoes are in mine ears! "Then comes the plaintiff in the above entitled action and says that the NooYork, Naven, & Nartford Railway Company is a corporation doing business in East Millville." That is where the plaintiff lives, and it is necessary to make it clear that this is the NooYork, Naven, Nartford Railway Company that goes to East Millville, because there is always some idiot who will think it is the NooYork, Naven, Nartford Railway that carries Chinamen from Pekin to Canton.

"And says that on said 5th of July he was in a car, passenger coach, oil tank, or other conveyance of said company. And that he was in the exercise of due care. And that a cinder, paving stone, shingle nail, or other obstruction did enter, penetrate, or otherwise move into his eye. And that, as a result of the said foreign obstacle entering his said eye and therein lodging as aforesaid, he became blind and otherwise unable to see

. . . great damage to his eyesight, earsight and all other kinds of sight whatsoever . . . distress of mind, sleeplessness . . . in the said defendant's passenger coach, automobile, wheelbarrow, and other conveyance. . . ." O legal English, abomination of desolation! To think that masters of style, like Bacon, have been lawyers!

In conversation, to be sure, the lawyers do speak English,—a poor grade, but intelligible to the jury.

The Lawyers.

Of all the parasitic classes, lawyers seem to one humble juryman to be the most pretentious, and quaintly hypocritical. Other business men simply do business, get all the profit they can, and, except at banquets and on other oratorical occasions, never pretend to be anything but business men. Lawyers carry with them a little remnant of professional ostentation. They use words like "justice," "right," "a fair and impartial consideration of the truth." They parade the lofty vocabularies of ethics, philosophy, and religion, in their daily job of getting money out of somebody else. If they could only see themselves from a juryman's point of view. . . . I think it would pay any large firm of lawyers to watch the courts, pick out the most likely looking juryman, and send him to law school and take him into the firm, in order to have somebody in the office who had once got a glimmer of things from the unprofessional side of the rail.

One day we heard that a very prominent lawyer was coming to court. He had an enormous reputation. His opponent and even the judge treated him with marked respect. Maybe he was skilful, maybe he fetched forth the testimony he needed with an adroitness which a juryman cannot appreciate. But I thought him a quite ordinary bore. He had a cheap wit, a self-satisfied way of taking the jury into his confidence by a sidelong glance after a particularly irritating question to the witness. I could have killed him before that case was done. In his argument he indulged in school-of-expression eloquence. I was moved. I wept tears of vexation and weariness. He ought to be sent to Congress for life. If there is such a crime as contempt of counsel, I owe $2,000,000 in fines.

The Wessex county courthouse is beautiful. It cost the taxpayers about four times what it is worth, but it is worth a great deal. All the panels, rails, chairs, tables, are carved in the same design from oak that is a joy to look at. In front of our jury box was a bar as thick as a steamer rail, 12 or 14 feet long. (On the witness stand I should not say it was 12 feet; I should say it was as long as from here over there.) How the lawyers pounded that rail! They are going to wear out that fine piece of oak, and then the county will have to put in a new one and taxes will go up. Cannot lawyers learn that they must not thump that rail?—that they are offensive when they protrude their faces into a juryman's face and simulate an earnestness which the facts of the case do not warrant? . . .

Carlyle says: "Law courts seem nothing; yet in fact they are, the worst of them, something; chimneys for the devilry and contention of men to escape by." Well, maybe so, old sage; the trouble is there is no vent for the gas; it stays in the court room near the jury box.

The Cases.

When you consider that in almost every case the lawyer can decide whether or not it shall be brought to court, the selfishness of the legal profession is quite patent. What cases they bring in! . . . Did any juryman ever hear a case in which the lawyers tried to elucidate the truth? Does a lawyer ever think of anything but victory? Is not the whole profession of law, which makes a poker-game of the quarrels of life, essentially damaging to the character of the lawyer? I cannot indict a whole profession, and so I am forced to conclude that the lawyer who remains an upright man must have great character (and probably good home influences), to have resisted the corruptions of his daily business. . . .

The courthouse at Mortville is maintained chiefly for the purpose of determining how much money shall be paid to

injured and uninjured individuals by the Elevated Railway Company, The Old Province Street Railway Company and The New York, New Haven & Hartford Railway Company (a corporation doing business in East Millville). The citizen should not complain of the almost exclusive use, by two or three corporations, of an expensive marble and oak-trimmed courthouse. . . . My prejudice and my judgment after the fact are against corporations. In any case between a workingman and a corporation I should be on the workingman's side and unfavorable to the company. For this reason,—the law was made by and for the corporation. . . .

Now, having put that as strongly as I can, I may say that in the majority of cases that I heard brought against the railroad companies the defendant seemed to me not clearly to blame. The public-service company pays the penalty for being known as a wealthy corruptor of legislation, which most jurymen are inclined to punish. Ambulance chasers, knowing this, bring the flimsiest cases against the companies, hoping to get at least enough to cover expenses. The result of this is that the company has to maintain a costly legal department and pay thousands of dollars to slightly damaged and undamaged passengers. The company gets the money back from the public, for the dividends go on just the same. Under the present system of private ownership of public carriers there seems no way out of this confusion of injustices. The individual who has a good case against the company suffers both for the notorious wholesale dishonesty of the corporations and for the petty dishonesty of claimants,—the kind of people who walk with a crutch until the day after the verdict and then throw the crutch away. If the woman who is just a little shaken up in a railway car could be made to realize that by going into court she helps to make it harder for her sister who is really hurt, I wonder if we should have so many fair perjurers on the witness stand. A court room is a good place to see the solidarity of society, and the way we all pay each other's debts willy-nilly.

Doctors.

Since half the civil cases are actions in tort against public carriers, about every other case brings to the witness stand the moral brother of the lawyer, the medical expert. Suppose a locomotive runs over a lady and gives her severe contusions on the right thumb. Six months later she has a baby, and the baby eats a chunk of coal and dies. A doctor will tell the jury ("in your own words, doctor") that in the absence of any other coal, it was the coal on the locomotive tender that killed the baby.

Cross-examination — But Doctor, whether or not in this case there was any other coal.

C. P.—I object.

Judge—That is not competent. He has not qualified as a coal-heaver.

Jury (inwardly)—On a nice bright day we can see a barn door 6 feet away. It's a rotten case, but we'll give the lady some money anyhow.

The medical profession ought to come to its own rescue in the matter of court practice. I suggest that the American Medical Association pass a resolution that it is the duty of every physician to testify as expert whenever he is asked, and that the fee should be divided and half of it paid to a public hospital. The effect of this would be to remove a part of the commercial curse from legal medicine and raise the ethical standard of "court physicians." It would also diminish insanity. Hundreds of jurors, after listening to expert testimony about anatomy, have tried to put themselves together again and gone mad; the asylums are full of them. Think of the sufferings of a juryman who goes home in an electric car after having heard nine doctors declare that the jolting of a car produces premature old age, ingrowing teeth, and cirrhosis of the liver. And it gives a man no compensating courage, no restored feeling of safety, to have heard ten other doctors declare that a car can run over both your legs, cut them off above the knee, without doing you any harm.

Truly the law court is an excellent place in which to learn not only your social relations to your fellow men, but

the anatomical relations of the organs with which nature has endowed you. In a court of law you have opportunity to assimilate any kind of wisdom permitted by your private mental metabolism. The juryman is in better position to learn than any other character in the drama. The lawyers, the judges, and the litigants stand in fixed attitudes towards each human quarrel and so their receptivity is throttled. But the juryman is a dispassionate spectator of the comedy in which he plays. If you have been a juryman, you have learned that you are not fit to be a judge; that you would be ashamed to be a lawyer; that you will never come to court as litigant if you can help it; that if you are ever a witness you will answer the questions in as few words as possible, and not act so foolishly as some witnesses you have seen; and that you can never be a sheriff unless you weigh two hundred pounds. All these things are valuable to know. The wise citizen will not wish to shirk jury duty, but will welcome the opportunity to see how very human human beings are when they are under oath.

By reason of the great liberality allowed by law in challenges, peremptory and for cause, it not infrequently happens that the jury is composed of the most ignorant men in the community. There are many cases brought on for trial in which the counsel for one side or the other knows that his only safety lies in excluding from the jury men of intelligence. This is no reflection on the counsel, whose loyalty to a client requires him to use all lawful and honorable means to secure a favorable verdict; but it is a severe condemnation of the law which sanctions such practice.

As Judge Deady has well said: "In this age and country, when and where every occurrence of any interest or importance is more or less circumstantially reported in the newspapers, and read or noticed by most persons of ordinary intelligence and responsibility, if an opinion formed from reading these accounts, or hearing the same repeated in common conversation, is allowed to be sufficient cause of challenge to an otherwise indifferent juror, it follows that trial by jury is degraded to a trial by the ignorance and dishonesty of the country, instead of its intelligence and integrity."

"The kind of jury trials to which we are drifting in the United States is a gross travesty of that known to the fathers. By the means which I have mentioned, the court is more or less muzzled and the jury emasculated. The trial is converted into a mere game of skill between counsel, in which the chance is largely in favor of the better, if not the sharper, player, without much reference to the law or justice of the case."

If a juror has formed or expressed an opinion from reading newspaper reports or upon rumor, and notwithstanding, testifies that his opinion will not prevent him from rendering an impartial verdict on the evidence adduced upon the trial, and the court is satisfied of this, he should be accepted.—John W. Hinsdale, Esq., of the Raleigh, N. C. Bar.

Art in Selecting the Jury

BY FRANCIS L. WELLMAN

of the New York Bar

Author of the "Art of Cross-Examination."

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BEFORE the trial actually begins, perhaps the most important part of an advocate's whole work is the selection of his jury. This I have always considered one of the fine arts of trial work.

Indeed, how could anything be more important than the selection of the men who are to decide the case? It matters not how thorough one may have been in preparation; it matters not how good a case one may have,—unless he selects the proper kind of men to decide it, he is bound to have a mistrial or a defeat.

It was not until the latter part of the sixteenth century that jurors in England began to assert themselves, and to decide cases according to their own consciences, rather than in obedience to the directions of the court.

This assertion of their independence gave rise to many interesting encounters between judges and juries after verdicts had been rendered contrary to the court's personal convictions. The judges would refuse to accept such verdicts; would sometimes try to coerce the jury to alter the verdict by locking them up without food, drink, or tobacco, and in some instances actually imprisoning the jurors and subjecting them to individual fines sometimes as much as £1,000.

It has often been said that possibly the one and only thing the Almighty does not know is what the verdict of a petit jury will be.

In my own judgment there is no better way to study a jury than to serve on one, and I have often thought that any man who is going to become an advocate could wisely serve many terms as a juror before he is admitted to the bar and thus becomes disqualified. In any event it is a wise practice for beginners to talk with their jurymen after their cases have been decided, and thus learn, by experience, the juryman's point of view of a case.

Deliberations of Jurors.

I think it would amaze the inexperienced trial lawyer if he could overhear the deliberations of the jurors before whom he has presented his facts.

Many years ago when I was serving my apprenticeship in the corporation counsel's office, and defending the city of New York in the ordinary damage cases that are heard before juries, the then clerk of the old superior court, Mr. Boese, used to take me into his private office, where, because of the peculiar construction of the large courthouse windows, it was possible to hear the deliberations of the jury in the room above. It was because of my semi-official position that I was accorded this privilege, and it was a great education.

I shall never forget the warning Mr. Boese gave me the first time I was accorded this privilege. He told me an anecdote about a leading trial lawyer who happened to come into his office after the trial of a very important case which he had just finished. The jury had gone out and were at the time deliberating in the room above. Mr. Boese asked his friend if he would like to listen for a moment to the deliberation of his jury. The lawyer stepped over to the window. Pretty soon some juryman exclaimed, "I tell you that lawyer for the plaintiff is a smart man." Whereupon, he turned to Mr. Boese with a smile on his face and remarked that the experience was not only instructive but rather pleasant. A moment later another juryman shouted out: "What did you

say about the plaintiff's lawyer,—did you say he was smart? Well, I don't know so much about that, but he thinks he's smart, that's certain."

Once when I was in the same room, listening to one of my juries while they discussed a case I had just finished, where a lady had fallen on a sidewalk and had sued the city for personal injuries resulting from her fall, I heard the foreman start the discussion by saying, "Now, gentlemen, before we consider the evidence there are some important questions of law for us to decide." Whereupon a loud voice called out, "Oh! to hell with the law. How much will you give the girl!"

But what of the lawyers who selected the jury in a case tried in the New York supreme court last spring? They returned a verdict for plaintiff for $10,000. The trial judge set the verdict aside as against the evidence and founded upon perjury. The next day all plaintiff's witnesses were indicted by the grand jury for perjury. The lawyers for the defendant sought an interview with some of the jurors to ascertain how they came to such a verdict. This was the juror's reply: "We didn't believe the witnesses on either side, so we made up our minds to disregard all the evidence and decide the case on the merits."

Questioning Jurors.

At the present time in New York county the lawyers are allowed six peremptory challenges in an ordinary civil case, and are allowed to examine each juror with considerable latitude.

I am bound to say that in my judgment the method of selecting a jury in vogue at the present time in our New York county courts, and the class of men that are impaneled to serve upon our juries, are far superior to any other locality or tribunal that I am acquainted with.

In Massachusetts, for instance, the lawyers are not allowed to put any questions at all to the jury, excepting those that are first submitted to the judge, who, himself, repeats them to the jury if he thinks they are proper questions. The result is that the lawyers have to rely entirely upon the personal appearance of the jurors and upon their examniation of the jury list before the term opens.

In Massachusetts the terms are for three months, and the list of the jurors is given out to the lawyers two or three weeks in advance. Anyone having an important case in that term usually has the whole list of jurors looked up by some detective agency.

Something similar to this method is employed in Canada, where no questions are allowed to be put to the jurors by the counsel, excepting where there is a challenge for cause; that is, where there is some reason for suspecting that a juror has already formed or expressed an opinion in the case, or has some pronounced prejudice against one side or the other. Questions are then allowed to be put to the challenged juror, and two other members of the same panel are selected by the trial judge to decide the question as to the juror's prejudice; these two jurors retire and bring back their verdict, which is final.

This, to my mind, is an absurd practice, and leads to the pernicious habit of having the whole panel of jurors investigated by the various litigants or their representatives before the term of court opens.

Even in our own Federal courts, where there are only three peremptory challenges, the judges restrict the examination of jurors to a few pertinent questions. It must be remembered, however, that in our United States courts the jurors are all selected, the names are taken from the city directory according to the the nature and location of their business, and, while in this way a more educated class of jurors is perhaps obtained, yet I doubt very much if the verdicts are as satisfactory on the whole as those rendered by the class of men that are selected for service in our state courts, where the jurors are summoned from all stations of life, with a reasonable view to intelligence and business occupation, and who therefore fairly represent the average intelligence of our great middle class.

Let us imagine an advocate selecting a jury in one of our state courts. He should keep in mind that in order to win he must persuade each one of the twelve to his view of the case,—as Rufus Choate once cleverly put it: "Jurors are

like twelve human dice which must all turn up one way, or there is no verdict."

Typical Jurors.

An advocate must remember that jurymen are all human; they carry their prejudices into the jury box just as surely as they carry their arms and legs. Some are hardened by their own ill luck and consequent contempt for their fellow men, and have a natural dislike to see anybody succeed in life; some are entirely lacking in that important factor in a man's make-up which is called the "milk of human kindness;" others are generous, humane, open hearted, open minded; some are intelligent, others stupid. Over there is a little man, his disposition is narrow, he shows in his face that he is self-opinionated and difficult to persuade, the world has used him ill; behind him sits a man with no opinion on any subject, willing to go with the majority on whichever side it may be; yonder is a hard, grim-faced man, with cold gray eyes. Do you want any of them? Which ones do you want, always keeping in mind the side of the case on which you appear and the nature of the case which you are about to try?

Laboring men prefer their own kind. Each nationality will to some degree stand together. If the advocate is for the plaintiff, he wants to avoid the cold-blooded, narrow-minded, narrow-hearted types; he wants to select young men with warm natures and intelligent faces. One can often read a man's character in his face, especially after middle life, although it should never be forgotten that an intelligent exterior sometimes conceals a very shallow mind.

He should remember that a jury of landlords will deal unjustly with tenants. Farmers will invariably side with farmers. Railroad men have a natural prejudice against those who attack railroads. On the other hand, a dislike of great corporations makes a good plaintiff's juror. Many a builder or expert mechanic has changed the whole twelve by knowing the case and explaining his version of it to his fellow jurors.

These are all distinctions that are so simple and plain that even mention of them seems unnecessary, were it not that they are overlooked every day in our courts, and as a result mistrials follow. Only the other day I saw a case being tried for the third time. There had been two disagreements, although the plaintiff was represented by a lawyer in middle life and of excellent reputation at the bar. It was an ordinary accident case brought for injuries received in an elevator situated in the Presbyterian Publishing Company's building.

The sole reason of the third disagreement of the jury was because the plaintiff's lawyer had inadvertently allowed to remain on the panel two stubborn Scotch Presbyterians, who held out all night for the defendant, against the other ten. Before such men the plaintiff's case was lost from the very start.

Scrutiny of Jurors.

I advise an advocate, therefore, to scrutinize his jurymen from the moment their names are called. He should watch the way they take their seats in the box. This may be the only chance he has to observe the juryman in action. The way he folds his coat, or brushes by the other jurymen in the box, may give the advocate some hint of his character and habits, and disclose to him whether he is courteous, methodical, or otherwise. Sherlock Holmes claimed he could tell a man's occupation if he could watch him walk across the floor.

Only a short time ago I observed a young lawyer who represented a railroad corporation examining his papers while the jury was filing into the box. His railroad was being sued by a plaintiff who had lost a leg in a collision, and a juror walked into the jury box limping, and was about to be accepted by this young attorney when his associate discovered that this very juror, himself suffering from an injured leg, had received his injuries in another railroad accident; obviously here would have been a juror no railroad company could ever have gotten over to its side.

The advocate should keep his eye ever on his jury (the eye is as eloquent and attractive as the tongue), and yet it should not be done offensively, nor as if it was a matter of too great importance. Nothing should escape him, however,—neith-

er a question of the adversary nor an answer by a juror. He should mark their employments, their methods of earning a living, their social positions, their age; should talk to them about the case, note carefully their answers, as these may disclose bias, and certainly will disclose their intelligence.

Examination of Jurors.

Oftentimes when questioning a juror, he will answer "yes" or "no," which answer really conveys no impression to the mind. He should be asked respectfully to tell what he means by "yes." This will show his intelligence and perhaps disclose a bias.

The very least expression of doubt is all that can be expected to be gotten from him. No juror will come out flat footed with his prejudice. He always qualifies it by saying he would "abide by the evidence and take his law from the court," but he won't; and if an examiner is satisfied with this kind of an answer, his work is sure to be poorly done.

Jurors are extremely slow to admit prejudice; and they should be encouraged by little pleasantries. I have often tried it with success; a juror is easily led to admit his bias or sympathy during a laugh.

The advocate should always examine the jurors himself, should try to get acquainted with them; he can often in this way tell whether he and they will get on together. It becomes a sort of second sight.

The value of getting acquainted with the jurymen is never more apparent than where, in some official capacity, one finds himself trying a succession of cases before the same panel of jurors. In the district attorney's office we always used to save our most important cases for the second week of the term. I have found that after I have been continuously in court, in successive cases, and before the same panel of jurors, it gradually became almost a hopeless task for my opponent to try to beat me. This is especially the case in the criminal courts, where the personal equation of the prosecuting attorney plays such an important part with the jury.

Not long ago, in the Federal courts, I challenged, peremptorily, a most intelligent looking man. He hung around the court room all the morning session, and came up to me about 1 o'clock and asked me apologetically if I would mind telling him why I had dismissed him from the jury. I replied pleasantly, "I have not the slightest idea, except that while we were talking together, I had a sort of feeling that you and I would not get on." Whereupon he replied: "You were absolutely right. I never knew you, but I have a deep-seated prejudice against you, and I would never give your side a verdict in any case."

Upon further inquiry, it turned out that he had been interested in a trial I had conducted some ten or fifteen years before, where he thought, from the newspaper accounts of the trial, that a criminal whom I had convicted ought to have been acquitted.

In examining the jury it is often well to take four at a time,—they usually sit in banks of four in the jury box, and one often encourages the other to answer freely; in this way the advocate gets their faces and their answers in contrast, better than when he examines them one by one.

Sometimes I make some pleasant little joke or courteous retort to the opposing lawyer, and at the same time watch closely the faces of the jury as I do so; some smile, others frown,—it helps me to decide which ones I like and want. It is a maxim that a man shows his faults when he laughs, and on the other hand, rather a dull face will oftentimes light up with charm and intelligence if it breaks into a smile.

Disclosure of Defense.

It is well to give the jury an idea of what the trial is about, so that one can get their minds running upon the kind of a case they are to listen to, and if the advocate is representing the defendant, he has the best possible opportunity to get before them his defense, and make them realize that there are two sides to the controversy.

Jurors ordinarily don't know what the defense is until the counsel for the defendant opens his side of the case.

It has long been my theory that as soon

as the plaintiff's counsel has explained his side of the case and before any evidence has been introduced, defendant's counsel ought to be given an opportunity to open his case, and tell what the defense is, so that the jury can realize what the issue is from the very start.

This, however, is not the practice of our courts, and unless, when appearing for the defense, the advocate takes the opportunity to let the jury know that there is a defense, and what it is, while he is examining them, they are apt not to hold their minds in abeyance while listening to the plaintiff's witnesses, and frequently get their opinions set while listening to the plaintiff's case, thereby making it very difficult to dislodge the impressions thus once formed.

Jurors also can understand the cross-examination better if they know the defense beforehand, and can appreciate what the advocate is driving at by his cross questions.

Form of Questions.

Ofttimes the law in favor of a defendant seems harsh to a layman. Whether this is so or not, a trial lawyer can frequently discover by framing a question in this wise: "Supposing the judge should charge you that the law in this case is so and so, would you accept it and decide the case accordingly; or would you form your own opinion and follow what you thought the law ought to be?" Many a juror will frankly say that he would abide by his own opinion, if the question is put in this way. Whereas, if the question is put as most lawyers put it, "Would you take the law from the court and the evidence from the witness?" the juror will always nod his head, and nothing has been accomplished by the question.

If, in answer to the question I have suggested, the juror shows the slightest hesitation or doubt, the examiner should not want him. How absurd it is to examine a jury in the manner we hear employed every day in our courts. "Do you know of any reason why you cannot decide this case according to the law and the evidence?" "If you think we are entitled to the money, will you give it to us?" "Do you know of any reason why you cannot try this case as an impartial juror?" Such questions elicit nothing but nods or shakes of the head, and no light is thrown on the subject.

Challenges.

An advocate should keep in mind that he has only six challenges, and should not use them all before his opponent has exhausted his.

I usually challenge two or three jurors right away, and my opponent, therefore, never suspects me of sparring with him on the question of challenges, and goes ahead and exhausts his six while I have three to the good, and then I have the selection of the jury in my own hands.

Prejudices of Jurors.

It is often well to examine as to the class of witnesses one is expecting to call. Many jurors have prejudices against experts. One nationality is prejudiced against another. The Irish are often prejudiced against Hebrews, and *vice versa*.

Germans are stubborn, but generous. Hebrews, as a rule, make fine jurors, except where they are prejudiced. Young men are much safer than old men, unless the advocate is for the defendant, when he wants older men.

If for the plaintiff, an advocate should remember that he must win the twelve; if for the defendant, he needs only one.

If he is defending in a criminal case, he needs all kinds of men on his jury, old and young, rich and poor, intelligent and stupid, a German, an Irishman, a Jew, a Southerner, and a Yankee. He should mix them up all he can, and let them fight it out among themselves and *agree if they can*.

There never was a greater error committed in the choice of a jury than in the recent trial of Captain Hains, at Flushing. Captain Hains was being tried for aiding and abetting the murder of a man who had seduced his brother's wife. The prosecuting attorney allowed to remain on that jury a half-breed Indian, who had been North from his home in Texas only six months. This Indian would never have voted for conviction in such a case, and as it turned out he became spokesman for the jury, and after

laboring with them for twenty-four hours succeeded in bringing them all to a verdict of acquittal. This acquittal, in the opinion of many lawyers who followed the trial, was one of the most startling verdicts we have had in any important case in this state for years, and yet from the moment the Indian juror was accepted by the district attorney all possibility of a conviction was at an end.

Flattery of Jurors.

An advocate should not smile and nod at his jury all the time, as so many of our lawyers do. It always seemed to me that it must be most offensive to the class of men he expects or wants to decide with him. He should treat them throughout as business men, not as curiosities. He should not flatter them; flattery never fails to fall flat.

How often we hear the inexperienced lawyer exclaim, "What is the use of that kind of evidence before honest men like these in the jury box?" If the juror is honest, he does not like to be called so in a court room. On the other hand, there is an ingenious way of flattering a jury which wins them without their knowing it.

I recommend the utmost courtesy toward them, the keenest attention to their questions, their comfort, their ability to hear the evidence, a courteous salute to them as a body of men, not as individuals, at the opening of court.

If the advocate himself believes in jury trials, the jury somehow realize that he trusts them, and they like it, and they try to live up to his confidence in them as a tribunal, and they come to like him because he likes them.

Many of these suggestions may seem almost trifling, but they are essential to success in jury work.

Winning Hostile Juror.

During the course of a trial an advocate often discovers that some juror is against his side of the case. He should be careful not to antagonize him; for he needs all twelve jurymen to win. He should be patient, and watch for a chance to win him over. If the juror asks a question of a witness, the examiner should not treat it as absurd or immaterial, however much it may be both. He should humor him, and get the witness to explain any unimportant point to him if he wants it so, and try to remove his erroneous impression. He should win him back to his side of the case by degrees and by personal consideration. He should realize that this juror at least is against him, and that he needs him, and should make up his mind to win him.

Why not flatter him a little by some such suggestion to a witness, as, "Please repeat that remark so that the tenth man can hear you." He feels his importance, and believes the advocate does, and likes it. Perhaps the lawyer on the other side, feeling sure of him, ignores him, and this begins to pique him.

Watching Jurors.

I have suggested watching the jurors as they go into the box and as they are being selected. I repeat that an advocate should watch them closely all the time,—watch them as the evidence is being introduced and as the case progresses, for in this way he will know better how to deal with them, for he can readily make up his mind which ones will lead the others, and consequently to whom he wants particularly to address himself.

Compulsory Vaccination and the Constitution

BY HENRY P. FARNHAM

Author of "Law of Waters and Water Rights."

THE courts continue to sanction vaccination laws with more or less compulsory features. The Constitutions of the several states, reenforced by that of the United States, provide in effect that no one shall be deprived of his life without due process of law. The right to life, as matter of course, includes the right to health upon which it depends. 1 Bl. Com. 129.

Vaccination is the introduction, by means of innoculation into the system, of the disease known as vaccinia, which is always disagreeable, sometimes fatal, and the *sequelæ* of which are unknown and unknowable. Protection against enforced vaccination is, therefore, directly afforded by the Constitutions unless they can be overridden, set aside, or made inapplicable. To avoid this constitutional protection, resort is had to the maxim, *Salus populi suprema lex*,—the welfare of the people is the highest law. In other words, the law of necessity. But under ideal constitutional government the law of necessity cannot be made to destroy or override constitutional rights unless the necessity is shown to have a real existence. The necessity cannot be established by the belief of a popular majority based on fear, ignorance, superstitution, or hysteria. The Constitution protects the individual against the arbitrary acts of both the popular majority and the government itself. Therefore, to establish the necessity for overriding the Constitution, the burden is upon those seeking to do so, and they must establish their case by at least a preponderance of the evidence. What shall this evidence be? Certainly not the *ipse dixit* of the legislature. Otherwise all persons tainted with tuberculosis might be put to death at its command. Certainly not the opinion or belief of the popular majority. Otherwise if some wave of superstition overspread the country, with the belief that to avoid a great national pestilence it was necessary for every one to embrace the Mohammedan faith, or sacrifice his children to Baal or Moloch, he might be compelled to do so. Certainly not, in the matter of vaccination, upon the opinion of physicians, for the emoluments of the practice are such that their interest renders their testimony subject to suspicion in any court of justice. Nor can it be found in the uninformed opinion or traditional belief of the judges. Otherwise the Constitution never would protect private life, for the judge is quite likely to have his opinions and beliefs molded by the popular majority. There must be direct and tangible evidence that vaccination is necessary to protect the community from smallpox. What, then, is the character of the evidence offered? It is composed of the *post hoc ergo propter hoc* doctrine, tradition, opinions of the kind that we have seen were inadmissible, and some specific coincidences or successfully manipulated statistics tending to show the benefit of vaccination.

There is probably less smallpox than there used to be. There are at least six possible causes for this fact: (1) The stopping of innoculation, (2) sanitation, (3) improved dietetic habits of the people, (4) isolation and quarantine, (5) vaccination, (6) changes in atmospheric conditions. Of these a large and growing minority of the people believe that the first four are entirely responsible for the change; while a majority believe that these are of no avail without the fifth, and they therefore contend for the compulsory enforcement of it. But, as already seen, it cannot be constitutionally enforced unless it is shown to be necessary. To show this

three things must be made to appear: First, that unprotected people are so liable to contract the disease that some protection is necessary; second, that vaccination is a real protection; third, that the vaccination of everyone is necessary for the protection of all. Neither one of these requirements is at present established. In fact, the evidence appears to be strongly against every one of them, even when confined to public reports and statistics, which are a matter of public record, and therefore a part of the common knowledge. The contagiousness of smallpox has evidently been greatly exaggerated. One of the basic claims for vaccination has been that very few unprotected persons would escape contracting smallpox when in contact with the disease.

In 1871, the city of Leicester, England, practically abandoned vaccination, so that now its population is almost wholly unvaccinated. In 1903-4, there were two epidemics in that city, and the disease performed just as it has done elsewhere in well-vaccinated communities. A few had the disease, and the death rate was very low; but hundreds of unvaccinated people who from time to time came in contact with the sick ones did not themselves contract the disease. It has also been assumed that vaccination was necessary to protect people. If, as appears from Leicester's experience, the great majority of the people under modern conditions have a natural insusceptibility to the disease, the part which vaccination has played in the suppression of smallpox becomes entirely problematic, so far as the question of its benefit is concerned, and the claim that it could have had any material protective influence is overcome by the cases in which it has failed to protect or mitigate the disease. Millions of cases of failure have been reported within the last few years. The report of the Register General of England shows that for the first fifteen years after the passage of the last and most rigid vaccination act in England, there were over 66,000 deaths from smallpox, which means that at least 300,000 vaccinated people had the disease. In Bavaria, in 1871, 29,429 vaccinated cases were reported. And in the same year, Prussia, with a very stringent vaccination law, lost just short of 125,000 people from smallpox, which means that nearly three fourths of a million of the inhabitants of that country had the disease during the epidemic. In Japan, under the most stringent compulsory laws, during twenty years, 171,000 cases were reported. In India, where vaccination has been practised for a hundred years, under the compelling power of the British government, the Secretary for India reported to the House of Commons, that for the thirty years ending with 1906, 3,334,325 deaths by smallpox had occurred. The Indian Army Commission reported in 1879, that vaccination in the Punjab, as elsewhere in India, has no power apparently over the course of an epidemic. In the face of these figures, showing the failure of vaccination to protect from smallpox in such a large scale, what does the majority popular opinion amount to? It merely falls into what Judge Timlin, in a recent case, designated as that "vast number of instances where common knowledge may possibly be only common error." Certainly the constitutional rights of a citizen cannot be nullified on such evidence. But finally, if vaccination does protect, then there is no necessity for its compulsory enforcement, because everyone who desires to do so may protect himself, and he cannot force his neighbor to do likewise any more than he can force him to keep out the draught to avoid taking pneumonia, or to eat oranges for the benefit of his liver.

Upon a mere statement of fundamental principles and facts which are public property, and which are met only by the assertion that, in the absence of vaccination, things would have been vastly worse, which seems to be refuted by the experience of Leicester, the unconstitutionality of a compulsory vaccination law is too plain to require argument. Even if, because of the long acceptance of vaccination as an established scientific fact, it could be claimed that the burden was on one questioning it, it would seem that that burden was fully sustained by the array of failures which have been incorporated into the government records.

Editorial Comment

A brief review of current topics

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Edited by Asa W. Russell.

Jurors and Newspapers

Among the venerable traditions concerning the jury, none has been more pertinently criticized than the custom of puting a premium on ignorance by preferring jurors whose minds are as devoid of contents as a vacuum.

On the trial of a murder case in South Dakota, not long since, the attorneys found a juror who, from the customary point of view, was an ideal specimen. He had not read any newspaper accounts of the murder,—he "never took no interest in newspapers." He had never heard of President Taft and he did not know the meaning of the word "tariff." He believed he "had heard tell" of Roosevelt; sort of thought Roosevelt was a soldier, but had "most forgot" what it was he had heard about him. Of course such a juror was accepted. He did not have any opinions about the case at bar nor apparently about anything else.

A few months ago Judge Shelton, of Macon, Missouri, had the courage to declare that men who do not read the newspapers are not calculated to make good jurors. If this idea were adopted it would expedite trials, reduce the cost of trying murder cases, insure the selection of a better type of jurors, and materially aid the cause of justice.

Can an accused person be said to be tried by a jury of his peers if the box is filled by men whose minds are closed against all the influences of enlightenment exercised by the press of to-day?

Fortunately the number of men who do not read newspapers grows smaller every year. You could not discover, in both the Dakotas, twelve men of the type of the juror mentioned. But, if that were possible, it were better that it be left undone. There is no more deplorable jest than a jury which is itself a joke bringing the law into ridicule and trifling with the rights of litigants or prisoners. The juries of the future will be composed of intelligent men, unwilling to play the part of the clown of the law.

The Juror Who Stands Out

The obstinate man who "hangs" the jury will never be popular. Whether he ought to be praised or condemned depends upon his motive. If he is true to his convictions and has reasonable grounds for them; if he manfully refuses to concur in a shameful compromise verdict,—he is a hero. If he is actuated by personal spite or blind prejudice, or worse still has succumbed to the wiles of the "jury fixer," he is a traitor to his trust and an enemy to society.

"The one juryman in the Schenk Case," comments the Cleveland Plain Dealer, "who was convinced that the evidence had proved the guilt of the defendant, acted courageously. Most men, no matter what their convictions might have been, would have gone over to the majority for the sake of expedience and to put an end to a nerve racking ordeal. On the other hand, the juror who, knowing the temper of the crowd, stood up in open court and pointed out the man who had 'hung' the jury, was guilty of a cowardly and despicable act. Both this man and the object of his scorn are typical. And the juror who stood out is by far the better man and the better citizen."

A man who takes the power intrusted to him as a juror and uses it for purposes of private revenge is despicable. A juror who sat in such a case relates the following: "A lawyer had bought up the claims of a dead and gone company of some kind down South, and came North to try and collect from some of the original stockholders. He sued a well-known gentleman of standing in the United States court before Judge Lacombe, and the defendant employed Mr. Choate to represent him. The whole thing was so preposterous that Mr. Choate said but little, and the jury was sent out. To the surprise of eleven of us there was on the first ballot one vote for the plaintiff. We began to discuss the matter, and one of the jurymen, who sat quietly filling his pipe, said: 'Gentlemen, it's no use discussing this matter. That was my ballot, and if we stay here a year you will never get me to vote in favor of that blankety blank blank (naming the defendant). I am employed in the Custom House, and some time ago when that fellow was returning from Europe he treated me as if I were dirt under his feet, and here is where I get square with him, damn him.' We of course had to report a disagreement, and at the same time gave a statement of the matter to Judge Lacombe."

That eleven out of twelve men agree upon a certain thing is strong evidence that they are correct,—but the eleven are not always right, nor is the one always wrong.

Women Jurors.

"Woman suffragists everywhere," says the New York Evening Post, "will note with interest the news that a jury of men in Wyoming acquitted a woman of the murder of her husband, because, according to the foreman of the jury, "we couldn't bear to think of sending a sobbing, shrieking woman to the gallows." One of the favorite arguments against the suffragette is that, with women on juries, sentiment would control; that tender feminine hearts, and not reason, would dictate the verdicts. It is a matter of interest that a chief justice of the territory of Washington declared that in his experience, with mixed juries, this was not the case; that women were not to be imposed upon by a pretty but artful dodger in the criminal's box, ready to make effective use of her handkerchief in moving the male jurors. In this Wyoming case, the evidence was plain, but, as the judge had instructed the jurors to find a verdict calling for the death penalty or to acquit, the jury set free the woman who shot her husband as he lay asleep. Of course, women jurors might have connived at a miscarriage of justice like this. But the incident clearly shows that neither all the wisdom of the world, nor all the hard-heartedness in matters criminal, rests with the sterner sex, and will embolden those who argue that, until women sit on juries, a woman criminal will not be tried by her peers."

Action—for death—right to bring. The great weight of authority and the reasoning of nearly all the cases seems to be in accord with the rule announced in the recent Maine case of Hammond v. Lewiston, A. & W. Street R. Co., 76 Atl. 672, that the failure of the beneficiary first entitled under the death statute to bring an action for wrongful death will not transfer such right of action to other persons for whose benefit the action might have been maintained if the person first entitled had not been living when the right of action accrued.

The reason for the rule, as explained in the note which accompanies this decision in 30 L.R.A.(N.S.) 78, is that the statutes giving a right of action for wrongful death for the benefit of specified persons are construed to create a single cause of action, which accrues immediately upon the death of the decedent, and exists for the exclusive benefit of the beneficiary in whom the action vests, so that it cannot be transferred to any other beneficiaries by the death or failure of the first beneficiary to sue, since there never was any right of action for their benefit, in the absence of statute providing for such contingency.

Bankruptcy—estoppel—failure to enforce trust. The question whether the owner who lets the title to his real property stand in the name of another thereby so places it in the power of the holder of the legal title to deceive the latter's creditors, that the owner will not be allowed to assert his rights as against their claims, has been frequently before the courts. It has been held that the true owner may be estopped by letting his title stand in the name of another.

In order that the doctrine of estoppel may apply, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury. It is held in Blake v. Meadows, 225 Mo. 1, 123 S. W. 868, annotated in 30 L.R.A. (N.S.) 1, that the mere failure of a woman immediately to enforce the promise of her husband to convey to her real estate which he has purchased with her funds, and the title to which he has taken, without authority, in his own name, does not, in the absence of fraud, estop her from relying on a deed in execution of the promise, made after he became bankrupt, although he was in business, and credit was given him, without her knowledge, on the faith of the property.

Contract—to procure evidence—validity. The Arkansas case of Neece v. Joseph, 129 S. W. 797, holds that a contract to secure evidence of a given state of facts, which will permit the winning of a lawsuit, is void as against public policy.

Speaking generally it may be said that while an agreement to disclose information is not necessarily invalid, contracts to furnish evidence to a particular effect are, as a rule, condemned by the courts.

The more recent decisions treating of the validity of contracts to procure testimony are collated in a note appended to the report of the foregoing case in 30 L.R.A.(N.S.) 278, which is supplemental to a note in 19 L.R.A. 371.

Corporation—right of stockholder to inspect books. A holder of corporate stock which has no market value, which he was forced to acquire for self-protection, and which he desires to sell, is held in the Delaware case of State ex rel. Brumley

v. Jessup & Moore Paper Co. 77 Atl. 16, to be entitled to inspect the books of the corporation for the purpose of ascertaining its value.

It is further determined in this case that a by-law of a corporation making the right of a stockholder to inspect its books absolutely dependent upon the discretion of its directors, and denying all right to make extracts from them, is unreasonable and void.

The courts have heretofore reasoned that the stockholders of a corporation are the owners of its franchise and its assets, and hence have a right to be informed of its financial condition. Therefore, when a stockholder furnishes sufficient *data* to warrant a conclusion that there is a mismanagement, and that the affairs of the company are not conducted in a proper manner and in the interests of the stockholders, he is entitled to examine the books, records, and accounts of the corporation, so that he may protect his interests; and if denied this right, he is entitled, upon proper application, to a mandamus to enforce it.

The recent case law bearing on this question is discussed in the note appended to the foregoing case in 30 L.R.A. (N.S.) 290, and which supplements earlier notes in 45 L.R.A. 446, and 20 L.R.A.(N.S.) 185.

Corporation—transfer of stock—insolvency—liability of transferee. One who purchases stock of a corporation which is not fully paid, from original subscribers, including the president, is held in Perkins v. Cowles, 157 Cal. 625, 108 Pac. 711, annotated in 30 L.R.A.(N.S.) 283, to be liable to creditors for the unpaid balance, although the sellers represented that the stock was fully paid, and he had no actual knowledge to the contrary, where by law the transfer effects a substitution of the transferee for the original subscriber upon the subscription contract.

Deed—married woman—examination—telephone. An unusual question was presented in the Tennessee case of Wester v. Hurt, 130 S. W. 842, annotated in 30 L.R.A.(N.S.) 358, holding that the privy examination of a married woman necessary to validate her conveyance of real estate under a statute prescribing its form cannot be taken by telephone.

Ferry—public—infringement—personal conveyance. Where one employs a flatboat or other vessel, not for the purpose of conveying any part of the public or freight for hire, but for the purpose of transporting his employees and his wagons and teams across a stream, to and from his sawmill, he is held in Futch v. Bohannon, 134 Ga. 313, 67 S. E. 814, not to infringe upon or violate the rights of the owner of a public ferry, though the right of the latter to maintain and operate a ferry is exclusive, and territorially extends beyond the point at which the former keeps and maintains the flatboat or other means for the conveyance of his employees and teams.

The recent decisions upon this question are collated in the note accompanying the report of this case in 30 L.R.A. (N.S.) 462, and which is supplemental to the note in 59 L.R.A. 513, in which the earlier cases are embodied.

Gas company—meters—reasonableness of rule. It seems to be a well-settled rule that a gas company may make reasonable and necessary rules and regulations in connection with its business, and while there are few reported cases involving rules with respect to meters, it seems clear that such rules may be made for the convenience and security of the company and the public, provided only they are reasonable and just.

A question of somewhat greater difficulty is whether any particular rule is of this character; and each case involving this question must depend largely upon the particular circumstances involved.

This is well illustrated by the recent Washington case of State ex rel. Hallett v. Seattle Lighting Co. 110 Pac. 799, annotated in 30 L.R.A.(N.S.) 492, holding that a rule of a gas company that, in all buildings where more than one meter shall be required, a separate meter room shall be provided, where all can be placed, is reasonable, where such arrangement would be more sanitary, less dangerous, more convenient for finding leaks, making repairs, and making collec-

tions from prepayment meters, than would the other, while the high pressure of the mains would be confined to the main service pipe.

Landlord—waste—infecting property with smallpox. The case of Delano v. Smith, 206 Mass. 365, 92 N. E. 500, 30 L.R.A. (N.S.) 474, is apparently one of first impression. It holds that infecting a building with smallpox, by a board of health which leases it from a mortgagor, may be found to be waste as against the mortgagee, if the jury finds that it is not reasonable and proper to let the building for this purpose, having reference to the probable effect upon its future, growing out of the presence of disease-producing conditions, in view of the existing state of the art of disinfection or other means of rendering it healthful.

Libel—school superintendent—applicant's license. A county superintendent of schools is held in Tanner v. Stevenson, 138 Ky. 578, 128 S. W. 878, annotated in 30 L.R.A.(N.S.) 200, not absolutely privileged in requesting the state board of examiners to refuse a teacher's license because of lack of good moral character of the applicant.

The rule laid down in this case is apparently well established by the few earlier decisions which have considered the question.

Marriage — annulment — misrepresentation of disposition. Misrepresentation by one of the parties as to disposition is held in Williamson v. Williamson, 34 App. D. C. 536, not to be such fraud as will justify an annulment of a marriage contract.

This decision is in accord with the rule laid down in the earlier cases which are discussed in the note which accompanies the Williamson case in 30 L.R.A.(N.S.) 301.

Master — assumption of risk — obvious danger—assurance of safety. The general effect, both of a direct command and of an assurance of safety by the master, is to modify the rules as to assumption of risk and contributory negligence, and when the two are combined, of course, a much stronger case is presented. Thus, in Brown v. Lennane, 155 Mich. 686, 118 N. W. 581, it was held that a servant does not, as matter of law, assume the risk of injury from working under an overhanging frozen crown in a sand pit, if he is commanded under pain of discharge to do so by his master's representative, with the assurance that the representative had tested it and found it was safe.

This decision is accompanied in 30 L.R.A.(N.S.) 453, by a note which is supplemental to earlier notes in 48 L.R.A. 542, on the effect of an assurance of safety given by the master, and in 48 L.R.A. 753, on the servant's right of action for injuries received in obeying a direct command.

Master—fellow servants—electrician and lineman. The important question whether an employee of an electric lighting company, in control of the current, is a fellow servant of a lineman, was presented in Shank v. Edison Electric Illuminating Co. 225 Pa. 393, 74 Atl. 210, holding that the electrician and engineer of an electric light company are fellow servants of a lineman, where they exercise no supervisory power over him or the work, so that the company is not liable for their negligence in turning on the current while he is in a position of danger, so as to cause injury to him.

The decisions relating to the question, who are fellow servants of a lineman, are collated in a note accompanying the report of this case in 30 L.R.A.(N.S.) 46.

Municipal contracts—letting in violation of statute—remedy of bidder. A statutory requirement that contracts for the performance of municipal work shall be let to the lowest bidder, is held in Molloy v. New Rochelle, 198 N. Y. 402, 92 N. E. 94, not to give such bidder a right of action against a municipality for his lost profits in case the contract is, contrary to the statute, awarded to a higher bidder, nor does the making of the lowest bid for the performance of municipal work, in response to an advertisement, effect a contract with the municipality, a breach of which will give the bidder a right of action, although the statute requires the contract to be let to the low-

est bidder, where the advertisement reserves the right to reject any or all bids.

This case is accompanied in 30 L.R.A. (N.S.) 126, by a note discussing the decisions relating to the remedy of the lowest bidder for a refusal of the authorities to award the contract to him.

New trial—right to, after reversal. Although much general language may be found concerning the effect of a judgment of an appellate court which reverses a judgment or decree of a trial court, cases which have expressly discussed the question whether a mere judgment of reversal without remanding, after due consideration of the law and facts of the case, will bar the bringing and maintaining a new suit, are not numerous.

The case of Strottman v. St. Louis, I. M. & S. R. Co. 228 Mo. 154, 128 S. W. 187, annotated in 30 L.R.A.(N.S.) 377, holds that a plaintiff whose judgment is reversed on appeal after consideration of the law and the facts is not entitled to the benefit of a statute permitting the institution of a new suit within a year in case of a nonsuit or a reversal of a judgment in his favor, where the appellate court is authorized to award a new trial, reverse, or affirm, since the reversal referred to in the statute must be held to mean one in which the merits of the cause have not been adjudicated.

Note—negotiability—terms of contract. It may be stated as the general rule that wherever a bill of exchange or promissory note contains a reference to some extrinsic contract in such a way as to make the bill or note subject to the terms of that contract, as distinguished from a reference importing merely that the extrinsic agreement was the origin of the transaction, or constitutes the consideration of the bill or note, the negotiability of the paper is destroyed.

In accord with this rule it is held in Klots Throwing Co. v. Manufacturers' Commercial Co. 179 Fed. 813, annotated in 30 L.R.A.(N.S.) 40, that a note which, on its face, is subject to the terms of a contract between maker and payee, is not negotiable.

Set-off—equity—claim against nonresident. Although there is a marked conflict in the authorities as to whether the nonresidence of the party against whom set-off is sought to be asserted is good ground for equitable interference to allow the set-off, it must be said that the majority of cases in which nonresidence was alleged have held it sufficient to warrant the application of the doctrine.

So, it is held in Ewing-Merkle Electric Co. v. Lewisville Light & W. Co. 92 Ark. 594, 124 S. W. 509, annotated in 30 L.R.A.(N.S.) 21, that equity will enforce against a claim of a nonresident for goods sold and delivered, a set-off of a claim of the purchaser against the seller for breach of warranty in another transaction between them, where satisfaction of such claim cannot be secured by action without compelling defendant to seek the courts of the state where the seller resides.

Street railway—leaving moving car—foreigner. That one injured by attempting to alight from a street car moving at the rate of 6 miles an hour was a foreigner, recently arrived in this country, and that he did not understand English, and was inexperienced in street car travel, but had seen other passengers leave moving cars, is held in Fosnes v. Duluth Street R. Co. 140 Wis. 455, 122 N. W. 1054, not to relieve him from the charge of contributory negligence in making the attempt.

The recent decisions treating of the negligence of a passenger in getting on or off a moving street car are discussed in a note accompanying the report of this case in 30 L.R.A.(N.S.) 270, and which is supplementary to an earlier note in 38 L.R.A. 786.

Taxes—Federal corporation tax—validity. There was a wide-spread opinion, when the United States Supreme Court, in May last, ordered a reargument of the Federal corporation tax cases before a full bench, that the court was then divided upon the question of the constitutionality of the tax, but the recent decision upholding the validity of this tax. (Flint v. Stone Tracy Co. Advance Sheets U. S. p. 342 was unanimous.

The court, speaking through Mr. Justice Day, first construed the tax as an excise on the carrying on or the doing of business in a corporate or quasi-corporate capacity, and then upheld it as so construed against the objections, among others, that it was a direct tax, and not apportioned among the several states according to population; that it was a tax on state agencies, and an invasion of the sovereign power of the states to create corporations; that it was unequal and arbitrary, and denied due process of law; that the measure of taxation, being the entire net corporate income, included nontaxable property; that it was unequal in its operation; and that its provisions making returns public records, and open to inspection, amounted to an unreasonable search and seizure.

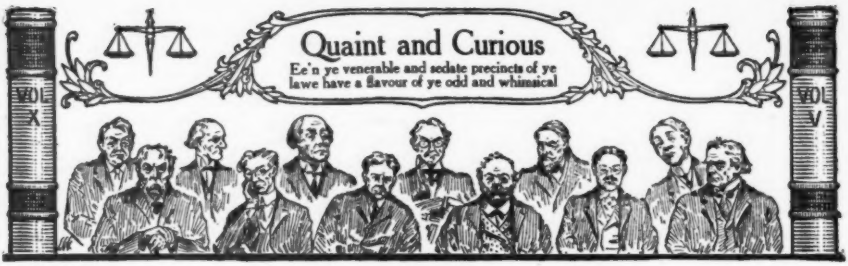
The court, in this and two other decisions handed down on the same day, was also compelled to decide whether certain of the corporations or quasi corporations in the cases before it were subject to the tax, and it was held that the statute applied to public-service corporations, real-estate corporations, and taxicab companies, but that it did not apply to trusts which did not derive any benefit from and were not organized under any statute, nor to a corporation which had practically gone out of business and was merely holding title to its real estate, subject to a lease, to receive and distribute the rentals or the proceeds of sale if the property should be sold.

Telegram—notice of probable injury—right to reject. The question whether a telegraph company is justified in refusing a message because of the liability in which it might be involved in case of mistake or delay seems to have been presented for the first time in Vermilye v. Postal Teleg-Cable Co. 205 Mass. 598, 91 N. E. 904, 30 L.R.A.(N.S.) 472, holding that the attachment to a telegram tendered for transmission, of a notice of probable damage in case of negligence in its transmission or delivery, gives the company no right to refuse to receive and transmit it.

Tort—evasion of tender—damages. The question whether the malicious or intentional evasion of a tender furnishes a basis of action for tort by the debtor against the creditor seems to be an altogether novel one. It was presented for decision in Loehr v. Dickson, 141 Wis. 332, 124 N. W. 293, 30 L.R.A.(N.S.) 495, holding malicious evasion of a tender of money necessary to prevent a foreclosure of a land contract, by reason of which the purchaser loses the profits on a resale which he had negotiated, does not give a right of action for tort.

Trademark—different application—validity. It is determined in the Virginia case of Virginia Baking Co. v. Southern Biscuit Works, 68 S. E. 261, that one who has applied the words "Crown" and "Jamestown" to crackers and small cakes, respectively, cannot complain that they are respectively applied by another manufacturer to ginger snaps and larger cakes of an entirely different class.

The few decisions which have considered this question are collated in the note accompanying the report of this case in 30 L.R.A.(N.S.) 167, and disclose that it is generally recognized that the use of a trademark or tradename upon articles of a certain class does not preclude the right of others to use the same trademark or tradename upon articles of an entirely different class; that is, of such a different class that the general public would not connect the person originally coining or using the trademark or tradename with the manufacture or production of the class of articles to which it is applied by the other person.



A Jury of Women. One of the first woman juries in a court of record in the United States was assembled in a county court in Colorado, by Judge Morning, to pass on the sanity of Elizabeth Hutchinson. Hahn's Peak was almost destroyed by a recent fire, and the court could not locate enough eligible men in the town to make up the necessary jury of six. The women were duly sworn, heard the evidence, and adjudged Miss Hutchinson insane.

A similar incident is reported from Olympia, Washington, where the first jury of women, drawn from a venire of women only, has been listening to testimony and arguments and handing in a verdict. The presiding judge declared that this jury was by far the best that had ever sat in his court.

One member was the wife of a prominent physician, and another that of a recent candidate for the legislature; a third was an officer of a humane society; a fourth was a minister of the Gospel, and the other two were stenographers to high state officials. A male jury of equal average merit would be a surprise and a blessing.

The case was one for damages arising from the scaring of a horse through the explosion of a dynamite blast.

After being out exactly an hour the women returned a verdict in favor of the plaintiff, awarding the full amount of damages asked.

A Fat Juror. A juror sitting at a recent term of the criminal court in Pittsburg had a most uncomfortable session. He weighed 435 pounds, and had great difficulty stowing away his bulk in the jury box. The chairs were too small for him, so he had to sit on the edges of two placed side by side. In passing in and out of the jury box he found the gateway so small for him that he barely managed to squeeze through.

He took the situation with good nature, however, and caused even the judge to smile at his struggles to and from the jury room.

A Forgetful Juror. John F. Dalton, clerk of the New York supreme court, told a story of a juror's excuse which surprised Justice Foote, of Rochester, who was holding court there a while ago.

Dalton said that a jury had just been accepted and sworn, and the court was adjourned until the following morning, when one of the jurors arose and said:

"Judge, I must ask to be excused."

"What is your reason for asking to be excused at this time?"

"My mother-in-law is to be buried tomorrow," responded the juror.

"Why did you not tell me that before you were accepted as a juror?" inquired the court.

"Because I forgot all about it," responded the juror.

The juror was excused.

Jury Flees after Giving Verdict. "Bargain stands as it is. Each party pays half the costs. Jury escaped." This is the entry in the docket of a justice of the peace of Sharon, Pennsylvania, after a suit over a horse trade. It had taken six hours to try the case. The jury retired and soon a slip of paper was handed the justice, bearing the jury's verdict, that the deal should stand and the costs be divided between the litigants. Declaring that no such verdict should be rendered in his court, the justice went to the jury room. He found the window up and saw the jurors scampering down the snow-covered hill.

Juries Just Like Soup. When we think of a jury we are not likely to think of pea soup, but they are children of the same etymological parent, and relationship is perfectly proper and natural.

The reason that a jury is a broth is because its members are bound together. In the broth you may have a dozen ingredients bound into one form by their mixture, the same as we have twelve jurors in a panel bound together by an oath to return a just verdict under the law and the evidence.

It is this uniting and binding of a jury that gave it its name. Our Aryan ancestors, when they were planting the little roots that have grown into a great family of languages, used the sound "yu" to express the idea "to bind" or "to mix," and when men were bound together by oath to try a cause, that "yu," expanded in English to "jury," was used to describe them. The Aryans also used the same root to signify what was mixed for food.

Our Hindu brothers took the root into their Sanskrit, making "yusha" out of it, and made it mean pea soup or broth. It also went into the Greek, expanding into "zomo," which also means broth. Through the Greek it went into Latin as "zus," again meaning broth, and into "ius," meaning justice. So we see how close broth and the purpose of a jury come, as combined in the root "yu," as the Latins used it. In the Latin the root was also expanded into "iurare," signifying to take an oath as a juror does.

Thus it is that the binding together of men by an oath and the mixing together of ingredients in a broth are of the same etymological origin.

Myers et al. Though the "Johnsons" and the "Smiths" far outnumber them in directory statistics, the Meyers family established a novel precedent in the Chicago municipal court, where five of that name served on the jury.

"What is your name?" the first juror was asked.

"F. W. Meyers" was the response.

He was accepted.

"Your name?" the next was asked.

"George Meyers" was the answer.

After William Meyers, William B. Meyers, and Harry Meyers had all been selected, Judge Scott, who had been sitting back in his chair, rose and asked for Bailiff Frank Norris.

"Mr. Bailiff," he said soberly, "would you kindly go to the jury room and see if you can find any more Meyers?"

The bailiff did, but all the Meyers were in Judge Scott's jury box, sitting side by side.

One Man Jury Unanimous. There was no chance for disagreement of the jury in a case tried before Judge Smith in the New York city court, on March 6th, as the jury consisted of one lone man. This single-handed jury was sworn, heard testimony in the case of Owen Hitchins, dressmaker and milliner, against Garrison B. Adams, of the chewing-gum family of Adams, to recover $450, the alleged value of goods sold to the defendant's wife, and returned a verdict for the plaintiff in the amount asked. It is said that this is the first instance of a one-man jury on record in the county.

A Hint. Some time before Judge S. S. Ford was elected to the common pleas bench he was employed as attorney for the defense in a case in criminal court. The jury was out three hours, but finally brought in a verdict of "not guilty."

Next day Judge Ford met one of the jurors in the case.

"Well, we set your man free," the juror said. "He was as innocent as a new born baby."

"Certainly he was," remarked Judge Ford. "I was a little surprised at the length of your deliberations."

"I'll tell you about that," said the juror. "If you had rested your case when the state got through, we would have acquitted your man in a second. That testimony you put in for the defense sort of rattled us.

"I'm an old juror, judge, and I want to give you a word of advice. When in a trial by jury you are defending an innocent man, keep him off the witness stand."—Cleveland Leader.

The Thirteenth Juror. An attorney writing to the Columbus (Ohio) Daily Legal News offers the following suggestions to his fellow members of the bar:

"It very often happens in the trial of jury cases that a juror becomes seriously ill during the progress of the trial, and when this occurs, a great outlay of money, labor, and time already given is often lost. The physical and mental strain to which the jury is subjected during a prolonged and involved trial, especially for a capital offense, is immense. To prevent such contingency we, for one, recommend the passage of a statute by our general assembly providing that a thirteenth member shall be added to the jury, to try case in instances to be determined by the trial judge; this discretion to be exercised by the judge *sua sponte* or on motion, verbal or written; —this thirteenth juror to hear the evidence in the case, and, in the event of sickness of one of the twelve, he is to occupy the place of the sick juror and take his part in the consideration of the verdict. If all goes well with the twelve, his connection with the case will end when the jury retires to consider the verdict."

Upon the whole, comments the News, this suggestion seems an unobjectionable piece of legislation, likely every now and then to do good service.

A Solution. Governor Stubbs of Kansas, at a banquet in Topeka, said, *apropos* of his recommendation that in all civil suits nine jurymen, instead of the whole twelve, suffice for a decision:

"Mine seems to me the only solution of this difficulty. Other solutions have been proposed, but they don't, as the saying is, solute. They remind me of the obtuse city father.

"An obtuse city father suggested of a huge heap of rubbish in the public square that a hole be dug for its burial.

" 'But,' another city father objected, 'what shall we do with the dirt that comes out of the hole?'

" 'Why,' was the reply, 'dig another hole and bury it, of course.' "—Evening Star.

Justice Russell on Truth. Justice Isaac Franklin Russell, of the court of special sessions, who was the chief speaker at the dinner of the society of the Alumni of Bellevue Hospital at Delmonico's, remarked:

"Professor Hugo Münsterberg says that when a woman tells a lie she turns her toes inward and that when a man is perjuring himself his toes instinctively turn in the opposite direction. Unfortunately I cannot observe these physiological and psychological phenomena because of my position on the bench, but I have come to know that the average man and woman cannot tell the truth before a court.

"First, because he or she is usually mistaken as to facts. Second, because neither he nor she has the fluent language at command with which to clothe the truth, and third because mankind is more prone to tell what he wishes were true than what really is true. Man does not want to tell the truth. The beauties of music, of poetry, and of painting have lifted his soul above earth, and he has no desire to drop back to the sordid realities of cold fact."

The Hebrew Won. I remember a humorous incident which occurred in Judge Peckham's court, writes an old-time juror. A tedious case had dragged along, and on Friday the judge told us that the court would sit on Saturday. Several of us business men didn't want to come to court on Saturday, and during lunch time we arranged with one of our number, a Hebrew, to remonstrate against serving on his Sabbath, and get us discharged until Monday. Well, when court reconvened we pushed our little man up to the front, and as soon as he spoke to the judge we saw there'd be something doing. The judge called up the counsel, one of whom was General Tracy, and there was quite a confab, resulting in the judge informing us that with consent of counsel he was going to withdraw a juror and go on with the case on Saturday with eleven jurymen. Our little game had been entirely successful for the Hebrew."

Recent Books of Interest to Lawyers

"Municipal Franchises."—Volume II. By Delos F. Wilcox, Ph. D. (The Engineering News Publishing Company, 220 Broadway, New York) $5.00 net.

This volume of 885 pages completes a notable work upon a subject of widespread and growing interest.

Volume I., published a year ago, contained an introductory part devoted to a general analysis of the nature of public utility franchises, the ways in which they are acquired, and the various means adopted to protect the public interests. A much larger part of the work was devoted to a description of typical franchises actually in operation in various cities of the United States.

The present volume is mainly devoted to local transportation franchises. The utilities considered are street railways, elevated railroads, subways, interurban railways, bridges, viaducts, toll roads, depots, belt line railroads, spur tracks, docks, markets, ferries, and omnibus lines. The author has placed early in the volume a chapter on "Elements of a Model Street Railway Franchise" containing important constructive suggestions. He devotes a section to "special features of interurban railway franchises;" another to "elimination of grade crossings," and discusses the question of "spur track franchises as a factor in the general terminal problem." Various general topics relating to the taxation and control of public utilities are presented in the eight closing chapters of the volume.

The book is ably written, well printed, and contains the latest word upon the important subject to which it relates.

"Jones on Evidence."—By Honorable Burr W. Jones, of the Wisconsin Bar, and Professor of the Law of Evidence in the College of Law of the University of Wisconsin. (Bancroft-Whitney Co., San Francisco and Rochester, N. Y.) $6.50. 1368 pp.

This is a new edition of Mr. Jones's well-known and valuable work on civil evidence. It is offered in two forms: A Library Edition in buckram binding, and a smaller and lighter Pocket Edition, flexibly bound in French Levant. Both editions contain identically the same matter and may be had at the same price.

The Pocket Edition, in form convenient to be carried into court, will be welcomed by all who have felt the necessity of having a reliable work on the subject for instant reference on any point that may come up at any time during the trial.

A very complete index of 202 pages renders accessible the wealth of information contained in this treatise which has long been recognized as a scientific presentation of the subject to which it relates by one of the ablest law writers of the age, and an undisputed authority.

"The Law of Motor Vehicles."— By Berkeley Davids. 1 vol. $5.

"Dictionary of Banking."—By W. Thomson. 1 vol. $8.50.

"The New Chicago Code 1911."—$8.

"Digest of Mississippi Decisions."—Prepared by McWillie & Thompson. Covering period following Brame & Alexander's Digest (Vols. 74–93 Mississippi), 1 vol. Law Sheep or buckram, $10.50.

"White's New Penal Code of Texas."—By Honorable W. L. Willie. 2 vols. $12.

"New United States 'Judicial Code' Annotated"—By James L. Hopkins. 1 vol. Buckram, $2.50.

"Pollard's Supplement to Virginia Code, Annotated."—Covering years 1905–1910. Being permanent. Vol. 3. $7.50.

New Legal Magazine.

We have been favored with a copy of the introductory number of the National Bankruptcy Law List, edited and published monthly at Brunswick, Georgia, by Mr. Max Isaac. It is the announced policy of the magazine to comment on bankruptcy decisions, to aid in perfecting the law wherever advisable, to act as a medium for the interchange of ideas relating to this important branch of the law, and to assist the bankruptcy lawyers and business men in its administration.

Mr. Isaac's long experience in the administration of the bankruptcy law especially qualifies him to discuss questions pertaining to it.

Recent Legal Articles in Journals and Magazines

Appeal.

"Harmless Error."—72 Central Law Journal, 151.

"Appeals from Closing Orders, under the Housing Act, 1909."—75 Justice of the Peace, 133.

Attorneys.
"What One has to Learn to be a Lawyer."—23 Green Bag, 126.
Aviation.
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Bankruptcy.
"The Recent Amendments to the Bankruptcy Law."—1 National Bankruptcy Law List, 11.
Banks.
"The Aldrich Banking Plan."—193 North American Review, 539.
"The Standard Oil Company—Bankers."—36 McClure's Magazine, 564.
Bar Associations.
"The Thirty-Fourth Annual Meeting of the New York State Bar Association."—23 Green Bag, 130.
Bills and Notes.
"The Negotiable Instruments Law."—28 Banking Law Journal, 205.
Canada.
"The Reciprocity Agreement and British Colonial Policy."—193 North American Review, 515.
Citizenship.
"American Citizenship."—11 Columbia Law Review, 231.
Civic Federation.
"The National Civic Federation."—23 Green Bag, 132.
Combinations.
"The Law of Combined Action or Possession."—45 American Law Review, 1.
Commerce.
"The Exclusive Power of Congress over Interstate Commerce."—11 Columbia Law Review, 251.
Conservation.
"Conservation and New Nationalism."—17 Case and Comment, 539.
Constitutional Law.
"The Twilight Zone."—17 Case and Comment, 546.
"The Doctrine of Due Process of Law before the Civil War."—24 Harvard Law Review, 366.
"Administrative Exercise of the Police Power."—24 Harvard Law Review, 333.
"The Constitutional Power of State Legislatures to Direct Election of Senators by the Popular Electorate."—16 Virginia Law Register, 818.
"Arizona's Constitution—The Initiative, the Referendum, the Recall—Is the Constitution Republican in Form?—72 Central Law Journal, 169.
Contracts.
"Mistake in the Formation and Performance of a Contract."—11 Columbia Law Review, 197.
"Coronation Contracts." 130 Law Times, 479.
Corporations.
"Corporate Personality."—24 Harvard Law Review, 347.
"The power of Congress to Charter Interstate Commerce Corporations."—26 Political Science Quarterly, 63.
"Stock Watering."—26 Political Science Quarterly, 98.
Counterfeiting.
"The Monroe-Head Counterfeit."—36 McClure's Magazine, 542.
Courts.
"The Courts."—5 Illinois Law Review, 476.
"Objections to Merging the Jurisdiction of the Circuit and District Courts of the United States."—14 Law Notes, 225.
"Decisions of the Federal Courts on Questions of State Law."—45 American Law Review, 47.
Criminal Law.
"The need of New Criminological Classification."—1 Journal of Criminal Law and Criminology, 907.
"Anglo-American Philosophies of Penal Law, III. The Ethics of Punishment."—1 Journal of Criminal Law and Criminology, 862.
"Needed Reforms in Criminal Law and Procedure."—1 Journal of Criminal Law and Criminology, 877.
"The Unequal Application of the Criminal Law."—1 Journal of Criminal Law and Criminology, 893.
"Publication of Convictions."—75 Justice of the Peace, 86.
The State's Guardianship over Criminals."—1 Journal of Criminal Law and Criminology, 899.
"Setting the Criminal Straight."—21 The World's Work, 14254.
Curtesy.
"Will a Legitimated Child Satisfy the Common Law Requisite for Curtesy?"—16 Virginia Law Register, 801.
Divorce.
"When Allowances *Pendente Lite* will be Made to the Wife, in Divorce Proceedings, Although She has Ample Credit and Large Means, both Real and Personal."—72 Central Law Journal, 209.
Electric Lighting.
"The Electric Lighting System of Paris."—26 Political Science Quarterly, 122.
Evidence.
"Parol Evidence to Supplement Descriptions of Real Estate in Writings, Especially in Contracts for Sale."—16 Virginia Law Register, 807.
"Evidence before Revising Barristers."—75 Justice of the Peace, 123.
Fences.
"The Liability of a Landowner to Fence His Land."—75 Justice of the Peace, 97.
"Fencing Dangerous Places under § 30 of the Public Health Acts Amendment Act, 1907."—75 Justice of the Peace, 109.
Government.
'The Next Step in Ponular Government."—14 Law Notes, 223.
"'People's Rule' in Oregon, 1910."—26 Political Science Quarterly, 32.
"Barriers against British Democracy."—26 Political Science Quarterly, 1.
Guaranty.
"Guaranty—Necessity of Demand."—43 Chicago Legal News, 256.

Homicide.
"Insanity as a Defense in Homicide Cases."—17 Case and Comment, 554.
"That Florafountin Murder Case."—23 Green Bag, 119.

Immigration.
"Needed—A Domestic Immigration Policy."—193 North American Review, 561.

Infants.
"Maintenance of Infants Contingently Entitled for Life."—130 Law Times, 433.

Insurance.
"Is Your Fire Insurance Real?"—21 The World's Work, 14207.
"Indemnity Insurance."—42 National Corporation Reporter, 189.

Justice.
"The Administration of Justice—Its Speeding and Cheapening."—72 Central Law Journal, 191.

Law.
"The Growing Disrespect for the Law."—45 American Law Review, 25.

Legislation.
"The West and the National Capital."—25 Pacific Monthly, 227.

Lincoln.
"The Career of a Country Lawyer. Abraham Lincoln."—45 American Law Review, 78.

Mandamus.
"The Use of Mandamus to Compel Educational Institutions to Confer Degrees."—20 Yale Law Journal, 341.

Marriage.
"The Continental Law Relating to Civil Marriages."—130 Law Times, 454.

Master and Servant.
"Is the Workmen's Compensation Act Constitutional?"—43 Chicago Legal News, 246.
"The Need of Reform in Our Employers' Liability Laws."—20 Yale Law Journal, 353.
"The Independent Contractor Rule in New York."—24 Bench and Bar, 101.

Mexico.
"Underlying Causes of the Mexican Insurrection."—193 North American Review, 596.

Mortgage.
"An Adventure in Mortgages."—21 The World's Work, 14204.

Municipal Corporations.
"The Liability of Local Authorities in Respect to Fire Plugs."—75 Justice of the Peace, 122.

Names.
"Proper Names."—20 Yale Law Journal, 387.

Navy.
"Will Congress Put Our Navy on the Sea?"—36 McClure's Magazine, 523.

Peace.
"The Rise of the Peace Movement."—20 Yale Law Journal, 358.

Perjury.
"Perjury before Justices."—75 Justice of the Peace, 134.

Poor and Poor Laws.
"The Proposed New Out-Door Relief Order."—75 Justice of the Peace, 98.

Porto Rico.
"Porto Rico in Transition."—81 Century Magazine, 870.

Practice and Procedure.
"The Reform of Procedure."—23 Green Bag, 111.

Recall.
"Republic or Democracy — Which?" — 17 Case and Comment, 552.

Records.
"The Failure of the Land Registry."—46 Law Journal, 119.

States.
"Shall the Republic Endure?"—17 Case and Comment, 549.

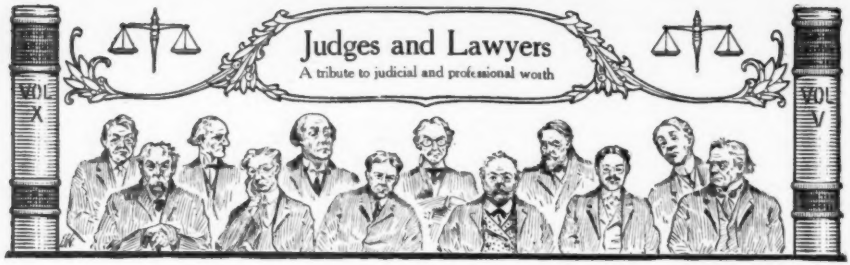
Strikes.
"The Respective Rights of Capital and Labor in Strikes."—5 Illinois Law Review, 453.

Taxes.
"Poor Rate Appeals: One Objection One Appeal.—"—75 Justice of the Peace, 110.

Trial.
"The Illinois Juror in the Trial of Criminal Cases. (Code provision that juries in all criminal cases shall be judges of the law and the facts.)"—5 Illinois Law Review, 468.

Waters.
"The Public and Towing Paths."—75 Justice of the Peace, 85.

Witnesses.
"Cross-Examination of the Perjured Witness."—17 Case and Comment, 561.



A Louisiana Lawyer, Statesman and Planter

THAT law, statesmanship, and agriculture are pursuits which may be successfully followed at the same time, has been demonstrated by Senator John Marks, of Napoleonville, Louisiana. He has attained prominence as a lawyer and legislator, and has also profitably conducted four large plantations.

HON. JOHN MARKS

Honorable John Marks was born in 1868 in Assumption parish, Louisiana. His father, an Englishman by birth, was first a teacher, then a lawyer. His mother is a Louisianian of the Blanchard family, and is now living at the age of eighty.

Mr. Marks read law in the office of the present Attorney General, Walter Guion, and also in that of Chief Justice Nicholls. He attended the Tulane Law School, from which he received the degree of LL.B. in 1889. In that year he became the junior member of the firm of Pugh & Marks, and remained with that firm for six years. He afterwards practised alone for three years, and subsequently as a member of the firm of Marks & Wortham, which has since become Marks, Wortham & LeBlanc.

Upon the death of his father-in-law, Colonel A. J. Lalande, it became necessary for him to assume the management of the Nellie and St. Clair plantations, as well as of the Cleveland plantation. He became so enthusiastic in this work that he purchased for himself the Ida Lou plantation. He did not, however, permit his duties as manager to prevent him from continuing the active practice of his profession. He removed from his residence, in Napoleonville, to the large and spacious Nellie home, 1¼ miles out of town. Two hours before breakfast he devotes to the fields, going on horseback to such points as the day's duties require. The remainder of the day is passed in his office in town. In this way Senator Marks makes his work a recreation. The

beneficial results of this mode of life were soon manifested by an increase in weight of nearly 60 pounds, which in no way inconvenienced him since nature cast him in a generous mold.

For twelve years Mr. Marks was a member of the Louisiana house of representatives, and for eight years he acted as chairman of the judiciary committee. For the last four years he has been state senator and served as chairman of the senate judiciary committee.

Justice Henry C. Peabody, of the supreme court of Maine, died suddenly from heart disease on March 29th.

Justice Peabody was born in Gilead, Maine, and was graduated from Dartmouth College in the class of 1859. He was admitted to the bar in 1862, and in 1870 was elected probate judge of Cumberland county, a position he held until he was appointed to the supreme bench, in 1900, by the late Governor Powers.

Judge Francis Cabot Lowell, of the United States circuit court, died suddenly at his home in Boston.

Judge Lowell's public career covered a period of twenty-two years, and included service in the Boston city council, three years in the lower branch of the legislature, and thirteen years on the Federal bench. For seven years he was a district judge and six years one of the judges of the circuit court. He was also connected with Harvard College as a fellow and member of the corporation.

Judge Albert Enoul Livaudais, one of the best known members of the Orleans parish bar, died recently at his residence, 1118 Robert street. Judge Livaudais was a native of New Orleans, having been born there September 26, 1844. He graduated at the Jesuits' College, and took up the practice of law. In 1872 he moved to Plaquemines parish, where he practised for a time, and was elected district judge of the district comprising Plaquemines and St. Bernard parishes. He served four consecutive terms, when he moved to New Orleans to become a partner of his son, Oliver S. Livaudais. On account of bad health he retired from practice in 1907.

Wisconsin's Chief Justice.

HON. J. B. WINSLOW

HONORABLE John B. Winslow, by reason of seniority of service, became chief justice of the supreme court of Wisconsin, upon the death of Chief Justice Cassoday, December 30th, 1907.

Judge Winslow was born October 4, 1851, at Nunda, Livingston county, New York. His ancestry runs back to the Winslows of Plymouth Colony. When the future chief justice was four years of age his parents removed to Racine, Wisconsin, and there he grew to manhood. He graduated from Racine College in 1871, and entered upon the study of law in the law office of E. O. Hand, and later in the law office of Fuller & Dyer, prominent lawyers of Racine.

He finished his course of reading in the Law Department of the University of Wisconsin, from which he graduated in 1875. Years later, when on the circuit bench, he delivered in the Law Department of the University an excellent course of lectures, which the students caused to be printed.

Judge Winslow began practice in Racine, and served for several years as city attorney. In April, 1883, he was elected circuit judge of the first judicial circuit, and entered upon the duties of that office in January, 1884. He served in that position until May 4, 1891, when he was appointed associate justice of the supreme court in place of Honorable David Taylor, deceased. In April, 1892, he was elected to fill the residue of Judge Taylor's term. In April, 1895, he was re-elected for a full term; and again re-elected for a full term in April, 1905.

Minnesota's Chief Justice.

HON. C. M. START

CHARLES M. Start, Chief Justice of the supreme court of the state of Minnesota, has had an enviable judicial career. He was appointed judge of the third judicial district of the state by Governor Pillsbury, in 1881, and was elected as district judge without opposition for three successive terms. He then resigned to accept the position of chief justice of the supreme court, to which he was elected in 1894. At the election of 1900 he was re-elected without opposition.

Charles M. Start, as the judge usually writes his name, was born in Bakersfield, Franklin county, Vermont, October 4, 1839. His father, Simeon Gould Start, was a farmer, and the judge was born on the farm. His mother's maiden name was Mary Sophia Barnes. He is of English extraction, and traces his ancestry to progenitors who came to America in 1652. His common-school education was obtained in the district school of his native town. His academic training was received at the noted Barre academy in Vermont. Having chosen as his life work the profession of law, he "read law"—as the preparation for the bar was then called—with Judge William C. Wilson, of Bakersfield, and was admitted to practice in 1860, at St. Albans, Vermont. He came to Rochester, Minnesota in 1863, and began his professional career. That place has since been his home, although his elevation to the supreme bench requires an official residence at St. Paul. He was county attorney of Olmsted county for eight years. In 1879 he was elected attorney general of the state, and served in this office from January, 1880, until March 12, 1881, when he resigned to accept the position of judge of the third judicial district, tendered to him by Governor Pillsbury. This was strong testimony to Judge Start's ability, for the governor was noted for the scrupulous care which he always exercised in making his appointments, frequently going outside of his party to select the proper man. He enlisted in July, 1862, in the Tenth Regiment Vermont Volunteers. August 11 he was commissioned first lieutenant of Company "I" of the same regiment, and in December following he resigned on a surgeon's certificate of disability. In politics he has always been a Republican. In religion, by birth and practice, he is a Congregationalist, although not enrolled as a member of the church.

W. R. Kelly, formerly member of the pioneer law firm of Harwood, Ames & Kelly, and for twelve years general solicitor of the Union Pacific railroad system, died recently at his home at Los Angeles, California. Mr. Kelly was one of the ablest members of the Lincoln bar, and was engaged in a number of important cases before he was called to Omaha to accept a position in the legal department of the Union Pacific.

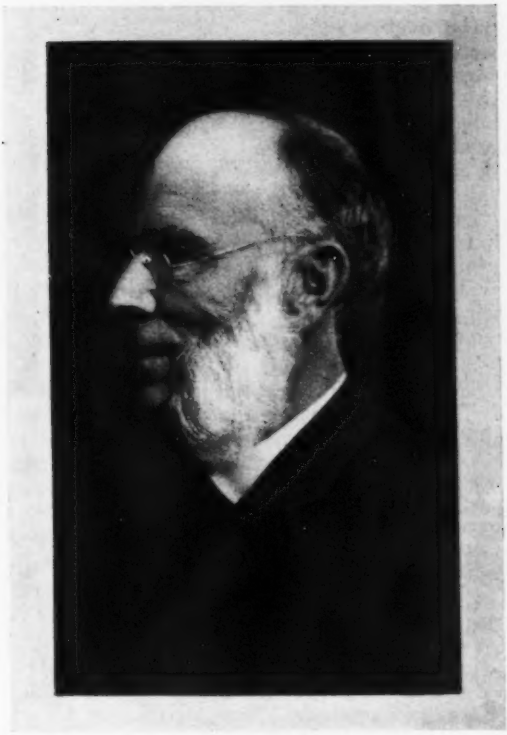
It is declared that the tremendous pressure that Mr. Kelly worked under for several years was the cause of the breaking down of a rugged constitution. He was a man of powerful frame with a marvelous capacity for work, and he never spared himself. Associates of his declare that no man could do a bigger day's labor than the general solicitor. The successful reorganization of the great system was largely due to the ability and energy of Mr. Kelly. When he left the service of the Union Pacific it was with the keenest regret on the part of E. H. Harriman, his employer and friend.

Charles Brown Lore, chief justice of Delaware for fifteen years, was found dead in bed in his home at Wilmington. After spending a year in the Methodist ministry he studied law. He was attorney General of Delaware in 1867, and served two terms in Congress as a Democrat. He was seventy-nine years old.

AN APPRECIATION OF

Abraham Clark Freeman

BY HENRY P. FARNHAM, LL.M., MANAGING
EDITOR OF LAWYERS REPORTS ANNOTATED.



ABRAHAM CLARK FREEMAN

Editor of 88 volumes of American Decisions, and Editor-in-Chief of the American State Reports from volume one to date; and author of many well-known text works, whose death occurred in San Francisco on April 11, 1911.

WHEN the editor of a set of law reports can so impress his personality upon his work that, although his name does not appear in the title of the reports, the reader is always conscious of such personality, and has him ever in mind when consulting the reports or speaking of them, his ability is unusual, and his position is unique. Abraham Clark Freeman did exactly that. Almost universally, an inquiry in any part of the country, to one familiar with the American State Reports, as to what he thought of them, would elicit some reply expressing appreciation of, and confidence in, the work of Mr. Freeman. A man whose work could command such unanimous respect must have had a high ideal, and have been indefatigable in his efforts to realize it. His ability was evident when nearly forty years ago appeared his works on Judgments, Executions, and

Cotenancy. But many a man who has shown ability in the production of a legal work or two has been content with that, and the rapidly passing years have supplanted them with more modern products, and left him in comparative obscurity. But Mr. Freeman, although actively engaged in the practice of the law and in other enterprises, was not satisfied to let his ability as a legal writer atrophy. He preserved and improved it by continuous use, and he put it into a form which would benefit the largest number during the longest time. His writing was always readable, and his method of statement carried conviction of the author's mastery of his subject. Like Story and Kent, he stated principles and made them stand out so clearly that the fledgling could recognize their truth, while the veteran was willing to risk his reputation by relying on them. In doing this his work was more difficult than was that of Story and Kent, for, while they had few cases to deal with, and could formulate their principles by the examination of few books, he was embarrassed by the modern mass of cases, the very number of which is apt to confuse and overwhelm the ordinary mind. But his peculiar genius lay in extracting a principle from a collection of cases which had applied it, and then stating it in his clear, terse, and crisp way so as to make it perfectly apparent to the reader, and save him the labor of examining the reports for himself. To extract principles from cases in this wholesale way requires an extended and accurate knowledge of the law, and an intimate acquaintance with decisions as such, so as to enable one to know what is vital and what is merely accidental. Many authors never acquire this ability. They can never lift the principle out of the mass of facts in which it is embodied, and make it stand out clear and untrammeled, to be applied whenever and wherever it is needed in the solution of other problems presented to court and counsel. But Mr. Freeman had this faculty in a marked degree. Chief Justice Whitfield, of Mississippi, once referred to him in an opinion, as the greatest living legal analyst. He seemed to deal with principles, and with them alone. And therefore his annotation work always reads more like high-grade text than like annotation as it is generally known.

He abundantly fulfilled his promise, made when taking charge of the American Decisions, that every effort would be made to keep the work up to the standard theretofore attained. And his statement that the public may rely on his putting forth his best effort to make the work upon which he entered worthy of continued confidence and support gives an insight into the aspirations and ideals of the man. Time has shown that his statement was not only a record of his true purpose, but it became the means of giving the profession the benefit of the growth which the years brought to him.

The profession cannot, without much study and comparison, appreciate what they owe to one who devotes abilities of the grade possessed by Mr. Freeman, to their service, rather than to the more lucrative branches of the law. So much of the legal writing which they are compelled to use has been so crude, undigested, and obscure, as well as unreliable as a presentation of the principles upon which they must rely in advising clients or deciding cases, that when a man with Mr. Freeman's legal ability, clearness of vision, and genius for making others see what he himself discovers devotes his life to putting within the reach of the profession the results of his labors, he has more than paid the debt which he owes to his profession, and has placed it under deep and lasting obligation to himself. The standard of law writing has been raised by Mr. Freeman's work. His successors will have a much more difficult task, and will have to keep before them a much higher ideal than did he to produce work which will be satisfactory to the buyers of law books. It is by such lives as his that progress is made, and that mankind is aided in its struggle from ignorance and mediocrity to a position of self-respect, and that the starting point of endeavor is pushed ever farther toward the goal of perfection.

Alabama's Attorney General.

HON. R. C. BRICKELL

ROBERT C. BRICKELL, the subject of this sketch, is the son of the late Robert C. Brickell, for many years chief justice of the supreme court of Alabama, and Mary Glenn Brickell, his wife. He was born at Huntsville, Alabama, September 21, 1877, and was educated in the private schools of Huntsville,—afterwards attending the University of Alabama for one session, and the University of Virginia.

He began the study of law under his father, and attended the Summer Law School of the University of Virginia in the summer of 1899. He was admitted to the bar, at Huntsville, Alabama, in November, 1899, and began the practice of law with his father, under the firm name of Brickell & Brickell. This partnership continued until the death of his father in November, 1900.

He then continued the practice of his profession, and was never a candidate for any office until he entered the Democratic Primary in the spring of 1910 as a candidate for Attorney General, for which position he was nominated over two other candidates, on May 2, 1910, and elected in November following, entering upon the discharge of the duties of his office on January 16th last.

Mr. Brickell is unmarried, and lived at home with his parents until the death of his father, from which time he has lived with his mother, in Huntsville, until he moved to Montgomery in January last.

It may be interesting in this connection to call attention to the fact that twenty-eight years ago, Edward A. O'Neal was governor of Alabama; his son Emmet O'Neal is to-day governor of Alabama. At that same time Robert C. Brickell was chief justice of the supreme court of Alabama; and his son is to-day Attorney General for the state. Henderson M. Somerville, now a judge of the United States court of appraisers, was an associate justice of the supreme court of Alabama; that to-day his son Ormond Somerville is an associate justice of the supreme court of Alabama,—the sons of these three distinguished fathers all entering upon their offices on January 16th last.

Micajah Woods, one of the best known lawyers in Virginia, died at his home in Charlottesville of grip, after a brief illness. He was a distinguished Confederate veteran. He was born in Albemarle County, Virginia, in 1844, the son of Dr. John R. Woods. Though only seventeen when the Civil War broke out, he enlisted in the Confederate service as volunteer aid on the staff of General John B. Floyd. The next year the eighteen-year-old soldier was made adjutant general of Clarkson's brigade, with rank of first lieutenant of cavalry. In 1863 he was commissioned first lieutenant of Jackson's battery of horse artillery and served in the Army of the Northern Virginia till the end of the war, taking part in many severe engagements.

After the war he entered the University of Virginia and was graduated in law in 1868. He settled in Charlottesville, and in 1870 was elected as the Commonwealth's attorney for Albemarle county, an office in which he served for many years by successive re-elections. In 1872 he was appointed by the governor one of the board of visitors of the University of Virginia, on which he served for four years, being the youngest man who ever acted in that capacity. In 1908-1909 he was president of the Virginia State Bar Association.

Otto T. Webb, of Houston, Texas, an active and esteemed member of the Harris county bar, died on March 6th. Mr. Webb was a lawyer of ability and a public spirited citizen, whose loss is deplored by a large circle of personal friends.

Ohio's Chief Justice.

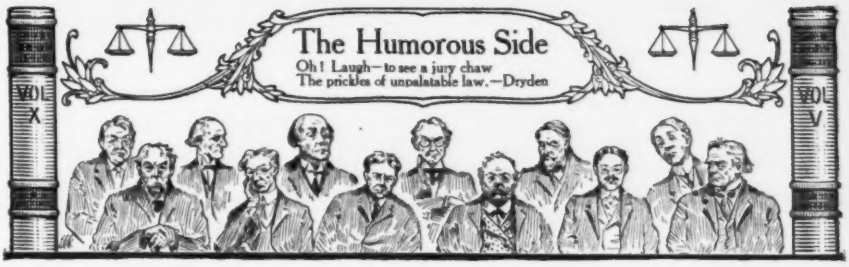
HON. W. T. SPEAR

WILLIAM T. Spear, chief justice of the supreme court of Ohio, was born June 3, 1834, in Warren, Trumbull county, Ohio, from whence came several of Ohio's distinguished judges. His father, Edward Spear, also a judge, was a native of Pennsylvania, of Scotch descent; his mother, whose lineage is traced back to colonial times, came from Norwich, Connecticut. His parents came to Ohio, settling in Warren in the year 1819.

Mr. Spear received a common-school education in the excellent union schools of Ohio, supplemented by a most valuable experience at the printer's trade. After serving an apprenticeship upon the "Trumbull Whig and Transcript," published at Warren, he went to New York city, where he was employed in the office of the New York Herald, and thereafter became a compositor, and later a proofreader, in the publishing house of the Appletons.

The value of the practical lessons thus derived, laying as they did a solid foundation for important duties which he was called upon to perform in after life, can hardly be estimated. Perhaps no pursuit quickens the powers of conception more than the craft of the printer, and especially has the experience herein outlined been of service to the judge in the preparation of judicial opinions. Says one distinguished in the craft: "If every lawyer, physician, and clergyman were to spend six months at the 'case' before entering upon his profession, he would find, even in that short time of labor, a useful and fitting preparation for such literary tasks as may afterwards devolve upon him."

The young printer appreciated his calling, but growing tired of the confinement of the printing office and having imbibed an ambition for the law, he returned to Warren, and at once began to learn something of the practical side of the profession of his choice, by serving as deputy clerk of the probate and common pleas courts of Trumbull county. He served in these capacities for several years, devoting his spare hours, in the meantime, to the study of law under the direction of Hon. Jacob D. Cox, since governor of Ohio, but then of the Trumbull county bar, later dean of the Cincinnati Law School, and instructive father of many lawyers. This preparation was followed by a course in Harvard Law School, where Mr. Spear was graduated in 1859, and, returning to Warren, was admitted to the bar at that place by the District court. Being thus equipped by reason of his practical and theoretical training, and ready to enter the field of contest, he at once became a member of the firm of Cox & Ratliff. Later he was associated in practice with Hon. John C. Hutchins, recently of the court of common pleas of Cuyahoga county. In 1871 he was elected prosecuting attorney for Trumbull county, serving two terms, and solicitor of his native city for two terms; and for several years he was engaged in the practice with C. A. Harrington, Esq., the firm enjoying a lucrative business. Soon after laying down the duties of those minor positions, Mr. Spear was elected judge of the court of common pleas, the duties of which office he entered upon in 1878. He was re-elected at the expiration of his first term, but did not complete the second term, because of his election to the supreme court, which occurred in 1885. He has since been repeatedly elected to succeed himself as a member of the supreme court. He became chief justice in 1892, 1897, and 1904, and was renominated to succeed himself upon the supreme bench, for the fourth time by the Republican state convention in May, 1904, and overwhelmingly elected at the November election of that year. He is still serving upon the bench, with undiminished strength and ability, and this year again ranks as chief justice.



A Cautious Juryman. Prosecutor Cline, of Cleveland, tells a story of a murder case he once tried, in which he had a good deal of difficulty in getting a jury chosen. He asked of one venireman the question: "Have you any scruples against voting for the infliction of the death penalty in case wilful murder is proved?" "I got to ask for infermation," said the venireman, cautiously. "Should I say 'yes' or 'no' to that question if I don't want to set on this here jury?"—Kansas City Star.

No Tip Yet. State's Attorney (to prospective juror)—Have you formed any opinion on this case?

Mr. Henpeck—No, sir. I don't think my wife has read anything about it yet. —Danville (Ind.) Republican.

How He Did it. A lawyer once asked a man who had at various times sat on several juries:

"Who influenced you most—the lawyers, the witnesses or the judge?" He expected to get some useful and interesting information from so experienced a juryman. This was the man's reply:

"I'll tell yer, sir, 'ow I makes up my mind. I'm a plain man, and a reasonin' man, and I ain't influenced by anything the lawyers say; no, nor by what the judge says. I just looks at the man in the docks, and I says: 'If he ain't done nothing, why's he here? And I brings 'em all in guilty.'—Short Stories.

Where He Belonged. "Tuttle was on the witness stand, and to every question he answered, 'I don't know.'"

"Then what?'

"The judge told the sheriff to put him on a jury."—Chicago Journal.

He Was One Too. George Schaper, the Nokomis druggist, was summoned to serve on the petit jury this week, and came down Monday to report. When Judge Jett asked if any jurors had good excuse for not serving, Mr Schaper arose and claimed to be exempt because he is a "pharmacist." He was excused, when another juror arose and asked to be excused also.

"What is your excuse?" asked the judge.

"I have about the same excuse," he said. "I am a farm assistant."

Subsequently he was one of those arbitrarily challenged. Neither side wanted a man with a wit like that on the jury.—Montgomery County News.

A Prejudiced Judge. Of the challenging of jurors one remembers a tale from Ireland. The prisoner was hard to satisfy, and juryman after juryman was asked to leave the box. However, all things come to an end, even in Ireland, and at last the swearing of the jury was completed. And then the prisoner leaned over the dock and sought the ear of his solicitor. "The jury's all right, now, I think," he whispered, "but ye must challenge the judge. I've been convicted under him siviral times already, and maybe he's beginnin' to have a prejudice."

Somebody Punished. "We ask that the defendant be placed on probation," said counsel for the defense.

"But a crime has been committed," objected the court, "and somebody should be punished."

"Well, judge, these jurors have been locked up for nine solid weeks."—Exchange.

An Appeal to Caesar. A boy on a witness stand was being badgered a good deal by a lawyer, who finally asked: "Now, see here, boy; isn't it true that your father is a man of rather shady reputation and that he has been arrested once or twice?"

"Well," said the boy calmly, "you can ask him if you want to, for he is settin' right over there on the jury."—Exchange.

A Confusion of Terms. Judge ———, who is now on the Supreme Court bench, was, when he first began the practice of law, a very blundering speaker. On one occasion, when he was trying a case in replevin, involving the right of property in a lot of hogs, he addressed the jury as follows: "Gentlemen of the jury, there were just twenty-four hogs in that drove —just twenty-four, gentlemen—exactly twice as many as there are in this jury box."

Faithful to His Employer. A coterie of lawyers were discoursing different things about law courts in general, when Judge John Fletcher, of Arkansas, said: "That reminds me of an occurrence that happened over in my state one time. A certain judge of much dignity became indignantly dissatisfied with the jury because they could not agree. Finally losing his patience, he threatened to discharge them. This threat was resented by one of the jurors from back in the piney woods, with some display of indignation. He rose to a point of so-called order by saying: "Yer hawner, you have no right to discharge me from this yere jury; that man there hired me to serve on this yere jury," at the same time pointing to the counsel for the defendant.—Exchange.

Not His Fault. "Ever been locked up?" demanded counsel.

"I have been," admitted the witness.

"Aha! And what had you been doing to get yourself locked up?"

"I had been doing jury duty."—Louisville Courier Journal.

Had Other Business. "In one benighted region of a certain state in the Southwest," says a Chicago lawyer, "they cherish some peculiar notions touching the duties of a juror.

"One day a case was being tried, when suddenly the justice exclaimed:

"'How is this? There are only eleven jurymen in the box. Where is the twelfth?'

"The foreman rose and addressed the court respectfully as follows:

"'May it please your Honor, the twelfth juror had to go away on important business, but he has left his verdict with me.'"—Picayune.

Jollying the Jury. Mr. Horridge is one of the familiar figures on the northern circuit, and his eloquence has often been heard to great advantage in the assize court in St. George's Hall, Liverpool. It was here that an amusing incident occurred which helps to illustrate the new judge's ready wit.

A brick-setter giving evidence in a case answered all the questions put to him in such a dulcet tone that neither the judge nor jury could hear a word.

"Speak up, man," said the judge, in a tone of exasperation. "These twelve gentlemen want to hear you. You'd talk louder if they were twelve bricks."

"As I certainly hope they are," said Mr. Horridge, beaming blandly at the jury on behalf of his client.—M. A. P.

A Wily Judge. At an assize court, according to the London Times, a juror claimed exemption from serving, on the ground that he was deaf. The judge held a conversation with the clerk of arraigns on the subject, and then, turning to the man, at whom he looked intently, he asked in a whisper: "Are you very deaf?" "Very," was the unguarded reply. "So I perceive," was the rejoinder of the judge, "but not whisper deaf. You had better go into the box. The witnesses shall speak low."